Salem Electric Company, Inc. and Options Temporary Employment Service, Inc. *and* Local 342, International Brotherhood of Electrical Workers, AFL–CIO

Salem Electric Company, Inc. *and* Local Union 342, International Brotherhood of Electrical Workers, AFL–CIO. Cases 11–CA–16141, 11–CA–16328, and 11–CA–16696

August 31, 2000

DECISION AND ORDER REMANDING

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On November 21, 1997, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent, Salem Electric Company, Inc. filed a brief answering the General Counsel's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] only to the extent consistent with this Decision and Order Remanding.

This case primarily involves the General Counsel's allegations that Respondent, Salem Electric Company, Inc. (Salem) unlawfully refused to hire and to consider for hire 66 individuals who were members of the Charging Party Union and who applied for work with Salem as electricians during 1994 and 1995. Additionally, the General Counsel alleged: that Salem unlawfully failed to reinstate two former economic strikers to their prestrike jobs or to substantially equivalent ones; that Salem and Respondent, Options Temporary Employment Service, Inc. (Options), as joint employers, unlawfully refused to hire three union members; and that Salem and Options each violated Section 8(a)(1) in different instances.

We have decided to remand this case to the judge on three broad, potentially related grounds. First, because we reject the judge's 10(b) rationale for dismissing the striker-reinstatement allegations, we remand these contentions for the judge to make findings and recommendations on the substantive unfair labor practice question. Second, we reverse the judge's finding that the General Counsel failed to establish that Salem and Options are joint employers, and we remand for the judge's further consideration of this and related issues. Finally, we remand the refusal-to-hire/refusal-to-consider allegations involving the 66 union members for the judge's further consideration in light of our recent decision in *FES*, 331 NLRB No. 20 (2000).

1. The 10(b) issue

Electricians Jeffrey Wyatt and John Reece were hired by Salem in June 1994 as "top helpers." Top helper is Salem's highest apprentice-electrician classification, in terms of both requisite skills and wages. There are four lower apprentice classifications, i.e., "first-year" through "fourth-year" apprentice. On October 4, 1994, Wyatt and Reece initiated an economic strike against Salem; at that time both were making $10.30/hour as top helpers. On December 21 the Union relayed to Salem an unconditional offer to return to work on behalf of the two strikers. On December 23 Salem informed the Union that both individuals, now former economic strikers, had been permanently replaced during the strike. Subsequently, although Salem continued to hire electricians, no reinstatement offers were ever made to Reece or Wyatt. The Union filed an unfair labor practice charge on September 18, 1995, claiming that Salem unlawfully refused to reinstate the former strikers.

As more fully detailed by the judge, Wyatt and Reece testified at the unfair labor practice hearing that they had heard rumors in late December and through the end of January 1995 that Salem was hiring. In fact, Salem hired three apprentice-electricians during that January. The judge found that the rumors of Salem's hiring activity heard by Reece, Wyatt, and presumably the Union, triggered an obligation to verify whether Salem had unlawfully failed to offer the former strikers reinstatement to the jobs being filled. He concluded that they were put on notice as of January 1995 when Salem in fact hired three apprentices, that the Respondent conceivably was violating the Act, and that the 6-month limitation period provided in Section 10(b) began to run at that time. Because the Union filed the unfair labor practice charge after the perceived 10(b) period had terminated, the judge found the charge untimely, and he dismissed the complaint allegation that Salem had discriminated against the former strikers without reaching the merits.

Once economic strikers have made unconditional offers to return to work, they are entitled to reinstatement to their former positions, or to substantially equivalent ones, as the positions become available. See, e.g., *Medite of New Mexico, Inc.,* 314 NLRB 1145, 1146 (1994), enfd. 72 F.3d 780 (10th Cir. 1995). Generally, a vacant position requiring lower skills and providing lower pay than the former striker's prestrike job is not substantially equivalent. See, e.g., *Rose Printing Co.,* 304 NLRB 1076 (1991); *Western Steel Casting Co.,* 233 NLRB 870 (1977); and *NLRB v. Oregon Steel Mills,* 47 F.3d 1536, 1540 (9th Cir. 1995), enfg. 300 NLRB 817 (1990). An employer's fail-

[1] Respondent Salem Electric Co. also filed a motion to strike the General Counsel's exceptions, asserting a failure to conform to Sec. 102.46(b)(1) of the Board's Rules and Regulations. The motion is denied because the exceptions are in substantial compliance with the requirements of the rule. See, e.g., *America's Best Quality Coatings Corp.,* 313 NLRB 470 fn. 1 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S. 1158 (1995).

[2] In light of our decision to remand this case, we find it unnecessary to consider at this time the judge's finding that Respondent Salem Electric's 8(a)(1) interrogation was "de minimis" and did not merit a remedial order.

ure or refusal to offer reinstatement when appropriate vacancies occur violates Section 8(a)(3) and (1). See generally, *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

If the employer's failure to offer appropriate vacancies is the keystone of a *Laidlaw* violation, the 10(b) limitations period for such a violation cannot, as a matter of logic, begin to run *before* an appropriate vacancy occurs. Moreover, as with any 10(b) defense, notice of the occurrence of an alleged unfair labor practice, whether actual or constructive, must be clear and unequivocal; the burden of proving such notice is on the party raising a 10(b) affirmative defense. See, e.g., *Strick Corp.,* 241 NLRB 210 fn. 1 (1979). In this case, Salem had the burden of proof on the 10(b) question.

The essence of the judge's 10(b) analysis is his finding that Salem filled three apprentice positions in January 1995—a time when Reece, Wyatt, and the Union had some information that Salem was hiring. In the judge's view, it was at this point that the Union could have alleged that Salem failed to offer reinstatement to the two former strikers, and thus, it was at this point that the 6-month period began to run. However, the record establishes that these three apprentice positions paid $8 per hour, $6.90 per hour, and $6.30 per hour respectively. At the time Reece and Wyatt went on strike they were top helpers—top-level apprentices—making $10.30 per hour. The three January vacancies appear to have been lower-level apprentice positions, with lower skill requirements and considerably lower pay. They do not appear to have been substantially equivalent to the former strikers' prestrike positions; certainly Salem has not established that they were. These positions have not been shown appropriate for the reinstatement of either individual. Accordingly, any "notice," regardless of its quality, that Reece, Wyatt, or the Union may have had concerning Salem's filling of these positions cannot serve to start the 10(b) period, because no demonstrable unfair labor practice occurred at that time.

Overall, Salem offered no evidence that the former strikers or the Union were properly on notice at any time before March 18, 1995—6 months prior to the filing of the charge—that their prestrike positions or substantially equivalent ones had been filled. Therefore, Salem's asserted 10(b) defense is without merit. *Medite of New Mexico,* supra at fn. 2. We will remand the 8(a)(3) allegations involving Reece and Wyatt to the judge for findings and recommendations on the substantive issues.

2. The joint-Employer issue

As the judge more fully relates in his decision, although Salem's usual practice was to hire long-term, permanent electricians, there were times when its business needs required the use of temporary employees. During May and June 1994, Salem contracted with Options, a temporary employment agency, for referral of temporary electrician-employees. The judge found that under their contract, temporary electricians were referred to Salem's worksite at its request from an existing pool of individuals already interviewed and hired by Options. Salem paid Options the agreed hourly rate for each referred employee; Options paid the temporaries their wages and benefits while they were on referral. Salem provided day-to-day oversight and directed the work of the referred employees while they were on its jobsite. In the event of a work problem with a temporary employee, Salem had the authority to advise the employee in an effort to correct the problem. However, Salem did not often exercise this authority. More often, if a temporary's work was unsatisfactory, Salem would request that Options remove him from the worksite and refer another in his place, and Options would comply.

The relevant allegations of the complaint state that in June 1994 Options and Salem, as joint employers, unlawfully refused to hire three electrician-applicants because of their union membership. The judge did not reach the question of Salem's liability for these alleged unfair labor practices, however, because he concluded that Salem was not a joint employer of the temporaries referred by Options and utilized by Salem. He found that the contractual arrangement between the two parties and the worksite employment conditions of the referred employees reflected the standard of the temporary-worker industry. Therefore, in the judge's view, Options was the temporary employees' sole employer, their "employing entity," while Salem was merely the "operating entity" at the worksite. Concluding that the General Counsel had not made a sufficient showing that Salem was a joint employer, he granted Salem's mid-hearing motion to dismiss the refusal-to-hire allegations above to the extent they included Salem.[3] The judge considered it unnecessary, therefore, for Salem to offer a defense to the joint-employer contention, and he precluded litigation to this extent.

We find that the judge's "standard-of-the-industry" analysis for joint-employer allegations involving temporary employment agencies is contrary to Board precedent. In *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995), the Board reaffirmed its established standard for evaluating whether entities are joint employers:

> In order to establish that two otherwise separate entities operate jointly for the purposes of labor relations, there must be a showing that the two employers "share or codetermine those matters governing the essential terms and conditions of employment." *TLI, Inc.,* 271 NLRB 798 (1984), citing *NLRB v. Browning-Ferris Industries,* 691 F.2d 1117 (3d Cir. 1982). The employer in question must meaningfully affect "matters relating

[3] The judge found that Options did violate the Act as alleged. Options did not contest the allegations and did not participate in the trial. On the first day of the hearing, its attorney announced that it was insolvent and out of operation.

to the employment relationship such as hiring, firing, discipline, supervision, and direction." *TLI*, supra.

The specific question before us is whether the General Counsel established a prima facie case that Salem was a joint employer of the temporary employees referred by Options. The judge found that Options interviewed, hired, and paid the wages and benefits of the temporary electricians referred to Salem. However, the General Counsel presented evidence that *Salem* provided day-to-day direction and supervision of them, and that it possessed the authority both to correct problems relating to their work and to order their removal from the worksite. The Board has found that circumstances similar to these demonstrate codetermination of essential terms and conditions of employment, and accordingly, a joint-employer relationship. *Capitol EMI Music*, 311 NLRB 997, 998 (1993), enfd. mem. 23 F.3d 399 (4th Cir. 1994). In that decision, the Board particularly noted that the power to take corrective action similar to Salem's in this case was, effectively, a form of disciplinary authority, and that the authority to require removal and replacement of a temporary employee was akin to the power to discharge. 311 NLRB at 998.

Accordingly, we find that the General Counsel made a prima facie showing of Salem's joint-employer status. On remand, the record will be reopened to permit Salem to contest this finding, and the judge shall reevaluate the issue and the ramifications concerning various other allegations of the complaint should he conclude that Salem and Options are joint employers.

3. The refusal-to-hire/refusal-to-consider allegations

The judge's consideration of the complaint's refusal-to-hire and refusal-to-consider allegations against Salem constitutes the bulk of his decision. Ultimately, he dismissed all of these allegations, for the most part concluding that the General Counsel failed to establish any prima facie case of unlawful discrimination in Salem's hiring.

On May 11, 2000, the Board issued its decision in *FES,* supra, setting forth the framework for analysis of refusal-to-hire and refusal-to-consider violations. We have decided to remand the refusal-to-hire and the refusal-to-consider allegations of this case to the judge for further consideration in light of *FES* and all other relevant precedent. If necessary, the judge should reopen the record to obtain evidence required to decide the case under the *FES* framework. In reevaluating these allegations, the judge should take account of any evidence or circumstances in the record which may become either relevant or more significant in light of his conclusions concerning the striker-reinstatement and joint-employer matters which are also being remanded.

ORDER

As more fully detailed in the decision above, this proceeding is remanded to Administrative Law Judge Richard J. Linton for further consideration, and reopening of the record where appropriate, of the following issues: whether Salem unlawfully failed and refused to offer former strikers Jeffrey Wyatt and John Reece reinstatement to their former or substantially equivalent positions; whether Salem was a joint employer with Options and potentially related issues; and whether Salem unlawfully refused to hire and refused to consider hiring the 66 alleged discriminatees named in the complaint.

Thereafter, pursuant to the applicable provisions of Section 102.45(a) of the Board's Rules and Regulations, the judge shall prepare and issue a supplemental decision containing findings of fact, conclusions of law, and a recommended supplemental Order, as appropriate on remand. Following service of this Supplemental Decision and Order on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

The issuance by the Board of an order remedying the unfair labor practices found in this proceeding is held in abeyance pending completion of the action encompassed by this remand.

Joseph T. Welch, Esq., for the General Counsel.

Guy F. Driver Jr., Esq., C. Matthew Keen, Esq., and (brief only) *Barbara R. Lentz, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart),* of Winston-Salem, North Carolina, for Respondent Salem-Electric.

H. David Niblock, Esq. (Nelson, Boyles, Niblock & Green), of Winston-Salem, North Carolina, for Respondent Options.

Gary M. Maurice, Bus. Mgr. (IBEW Local 342), of Winston-Salem, North Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a "salting" case. The principal allegation of the Government's complaint is that Salem Electric refused to hire, and refused even to consider for hire, 66 named employees who applied for work with Salem beginning about mid-February 1994 and running through September 30, 1994.[1] Salem so declined, the Government alleges, because the named employees supported International Brotherhood of IBEW Local 342. Salem denies. Finding against the Government, I dismiss the principal allegations of the complaint.

I presided at this 10-day trial, November 12, 1996, and various dates through February 12, 1997, in Winston-Salem, North Carolina. Trial was pursuant to the November 9, 1995 Second Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the complaint) issued by the General Counsel of the National Labor Relations Board (the Board) through the Regional Director for Region 11 of the Board.

The complaint is based on an original charge filed July 28, 1994, in Case 11–CA–16141, by International Brotherhood of Electrical Workers, Local Union 342, AFL–CIO (the Union, Local 342, or the Charging Party), against Salem Electric Company, Inc. (Salem or Respondent) and Options Temporary Employment Service, Inc. (Options) as the [joint] employer. That charge was amended twice, first on August 2 and again on November 10, 1994. On December 12, 1994, the Union filed the charge in Case 11–CA–16328 against Salem alone. Similarly, and contrary to the caption of the complaint, on September 18, 1995, the Union filed the charge in Case 11–CA–16696 against

[1] All dates are for 1994 unless otherwise indicated.

Salem alone. I have realigned the caption to show that the charges in the second and third cases were filed against Salem alone, and that only the charge in Case 11–CA–16141 was filed jointly against Salem and Options.

The original charge, as filed July 28, 1994, in Case 11–CA–16141, is devoted mostly to alleged discrimination against Michelle Kay. The amendments to the charge add other allegations. At trial (Tr. 7:1110).[2] I granted the General Counsel's unopposed motion (based on witness unavailability) to withdraw the complaint allegations pertaining to Michelle Kay.

The complaint was amended on April 18, 1996, to supply language missing from complaint paragraph 14 (regarding an alleged December 1994 interrogation); on October 17, 1996, to correct the date Salem allegedly failed to reinstate alleged unfair labor practice strikers John Reece Jr. and Jeffrey Wyatt; and at trial to add, to complaint paragraph 12 alleging agency, the names of Robin (Gilchrist) McIntosh, receptionist (Tr. 2:190; GC Exh. 31); Jeri Stafford, office manager (Tr. 5:703); and Kelly Cartner, receptionist (Tr. 6:873, 878). Salem denies as to all but Stafford.

The pleadings establish that the Board has both statutory and discretionary jurisdiction over both Salem and Options, that each is a statutory employer, and that IBEW Local 341 is a statutory labor organization.

As earlier noted, Respondent Options did not participate in the trial and did not file a posthearing brief. Shortly after I opened the record the first day of the trial, Options' attorney, H. David Niblock, announced that, as Options was insolvent and not doing business, he would not be participating in the trial. (Tr. 1:10–11.) Attorney Niblock left and did not participate thereafter.

Before resting, the General Counsel called 39 witnesses (with 29 being among the 66 who are the subject of the principal allegation), including Stephen M. Sink, Salem's vice president, and Jesse Banks Wilson Jr. Wilson is Options' former "construction superintendent" (pleadings), or former assistant to Options' president (Tr. 7:1084, Wilson). The Union rested immediately thereafter. (Tr. 7:1157.) After its motion to dismiss, most of which I denied, Salem proceeded with its case in defense and called nine witnesses (Vice President Sink was recalled). In rebuttal, the General Counsel recalled Union Representative Gary M. Maurice. There was no surrebuttal.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel (who included, as part of the requested remedy, suggested provisions for a proposed order) and Respondent Salem,[3] I make these

FINDINGS OF FACT

A. Procedural Matters

Since about January 1994, complaint paragraph 10 alleges, Options and Salem have been joint employers (herein, joint employer) "of the temporary employees provided by Respondent Options to Respondent Salem a Respondent Salem's Winston-Salem, North Carolina, job sites." Salem and Options each denies. Following the Government's withdrawal of the allegations pertaining to Michelle Kay, the main significance to Salem of the joint employer issue appears to be the alleged (complaint par. 16) June 24, 1994 refusal to hire employees Mack Good, Patrick Dean Parsons, and Paul D. Vogler, and imputed responsibility for any statements made by representatives of Options.

Although I denied most of Salem's motion to dismiss after the General Counsel rested, I granted the portion respecting complaint paragraph 10, the joint employer allegation. (Tr. 7:1162.) Initially declining to dismiss complaint paragraph 16 (Tr. 7:1165), on Salem's reurging (Tr. 9:1218) I changed and granted (Tr. 9:1220) the motion. On brief the General Counsel reargues the issue. While it would have been better practice for the General Counsel earlier to have requested leave to reargue the matter (thus, giving Salem notice and an opportunity to file an opposition or address the matter in its own brief), I still was faced with the question of whether I correctly dismissed complaint paragraphs 10 and 16. Accordingly, treating the General Counsel's submission as a request for leave (on Br. at 100, the General Counsel states that reconsideration is warranted), I granted that request by fax of September 10, 1997. In that same fax to the parties, I gave Salem the opportunity to file a supplemental brief on the joint employer issue. Salem's 20-page supplemental brief of October 20, 1997, has been considered.

Later in this decision I revisit my ruling dismissing complaint paragraphs 10 and 16. Nothing in the law-of-the-case doctrine prevents a presiding judge from revisiting earlier rulings before final judgment or decision. *Genentech v. U.S. Int'l. Trade Commission,* 122 F.3d 1409, 1422 fn. 13 (Fed. Cir. 1997); *U.S. v. Palmer*, 122 F.3d 215, 220 (5th Cir. 1997); *Conrod v. Davis*, 120 F.3d 92, 95 (8th Cir. 1997); *Langevine v. District of Columbia*, 106 F.3d 1018, 1022–1023 (D.C. Cir. 1997).

Substantially into the Government's cross-examination of General Superintendent James H. Manuel Jr., the General Counsel asked whether Manuel had reviewed any notes, statements, or outlines in preparation for his testimony. Salem objected on the basis that the request was too late. (Tr. 10:1597–1598.) Under FRE 612(2), such reviewed-before-testifying documents must be produced "if the court in its discretion determines it is necessary in the interests of justice." Manuel's direct examination had taken 17 pages of transcript and, by my notes, some 23 minutes. As of the question and objection, the cross-examination had taken 14 pages and 22 minutes. While that does not mean the Government already had covered every topic mentioned on direct examination, or that the Government might not have found new or additional suggestions to explore in any notes, statements, or outlines, it is clear that the cross examination had covered a substantial portion of the matters mentioned on direct examination. Indeed, the cross-examination soon concluded (at Tr. 10:1604).

Applying the same timeliness concept used at the beginning of cross-examination when respondents, under the *Jencks* rule (29 CFR §102.118(b)), request all statements given or adopted by the witness which relate to the direct examination,[4] I ruled (Tr. 10:1598) that the request had come too late. (Actually, my ruling was premature, for Salem objected before the General

[2] References to the 10-volume transcript of testimony are by volume and page. Exhibits are designated GC Exh. for the General Counsel's and R. Exh. for Respondent Salem's. The Charging Party offered no exhibits, and Respondent Options did not participate in the trial.

[3] Salem filed a motion, dated May 19, 1997, for leave to file an attached 14-page reply brief to the General Counsel's brief. The General Counsel filed an opposition on the ground that the Board's rules do not authorize reply briefs. Salem filed a response. I have considered Salem's reply brief. *Fruehauf Corp*., 274 NLRB 403, 403 JD fn. 2 (1985).

[4] See *Longshoremen ILA Local 20 (Ryan-Walsh Stevedoring Co.*), 323 NLRB 1115, 1120 (1997) (Respondent waived right because request came too far into cross-examination).

Counsel had asked for production. My error, however, was not prejudicial.)

B. Salem's Business Operations

Frank Bradford Myers Jr. is the president and owner of Salem Electric. Myers' father formed Salem in 1946, and Myers became president in 1978 after his parents died. (Tr. 7:1180–1181.) Salem, Myers testified, is an electrical construction firm. Salem handles commercial, industrial, institutional (such as hospitals), and residential. Salem does not compete for heavy electrical construction work such as power plants and power transmission lines. (Tr. 7:1181.)

Salem's geographical strategy, as Myers describes, is to work locally, and 95 to 98 percent of its work is done within a 45-mile radius of its Winston-Salem office. On rare occasions, primarily at the request of an existing customer, Salem takes a project outside its normal work radius. (Tr. 7:1181–1182.) As Vice President Stephen M. Sink estimates, Salem performs 60 to 70 percent of the electrical work that is done in Winston-Salem. (Tr. 9:1228.) Salem's work is about evenly divided between long-term customers, such as maintenance contracts with major employers in the local area, and bid projects, with the long-term work having a slight edge. (Tr. 9:1227–1228.) To perform this work, Salem normally employs a regular work force of some 250 outside electricians. (Tr. 7:1049, 1190; 9:1225, 1227.) The regular work force, the hourly payroll, consists of apprentices (first year through fourth year helper, then top helper), journeymen, working foremen, control technicians, job foremen, superintendents, and, finally, General Superintendent James H. Manuel Jr. (Tr. 7:1045–1046; 9:1226.) Manuel reports to Vice President Sink who reports to President Myers. (Tr. 7:1044.) The inside work force consists of some 25 managers, clerks, and other salaried staff personnel. (Tr. 7:1049, 1190; 9:1225.)

As a mirror reflection of its policies as to the geographical range of its jobs, and the type of its customers and jobs, Salem stresses two points regarding the hiring of its regular outside work force, long term, and local. Salem's overall, or strategic, hiring policy for its regular, outside work force is to hire quality, local employees who will stay with the Company on a long-term basis. (Tr. 7:1182, 1190, Myers; 7:1057; 9:1226, 1228, 1353; 10:1468, 1472, Sink). Thus, for its regular, outside work force, Salem does not hire, as some construction firms do, for the short term and lay off as the job winds down. (Tr. 7:1182–1183, Myers; 7:1057; 9:1226, 1230, 1283, 1353, Sink.)

To help attract and retain such quality electricians, Myers testified, Salem pays competitive wages and benefits plus daily overtime. (Tr. 7:1182, Myers; 9:1353, Sink.) Of Salem's current (regular outside) work force, Sink testified, over 160 (of the 250 or so) have been with Salem for over 3 years, and over 220 have been with Salem for at least a year. (Tr. 9:1227.) Most of the turnover is among the first year apprentices who, Sink testified, are younger and, after discovering that they may have to dig a ditch, decide that they do not want to be an electrician. (Tr. 9:1291; 10:1461.) For 1994 and 1995, half of the regulars hired were first-year apprentices. Thus, of 85 regulars hired in 1994, 43 were first-year apprentices. Of 137 regulars hired in 1995, 67 were first-year apprentices. Salem "continually" must hire first-year apprentices because that is where [most of] the turnover is. Indeed, in 1994 Salem hired only 8 journeymen, Sink testified. (Tr. 9:1291–1292; 10:1461; R. Exh. 32.) [Actually, that is the number hired beginning February 14, the date of the first alleged refusal to hire. Tr. 9:1267.] As Sink phrases it, "[W]e just don't hire many journeymen because our people stay with us a long time." (Tr. 9:1292.)

At times Salem employs, or contracts for, irregular additions to its outside work force. Typically this is when Salem takes on a big short-term project (Tr. 7:1046–1048) or (Tr. 9:1241, 1430) one of the rare out-of-town projects. Rather than hire permanent employees, and then lay them off as the project nears completion, Salem simply contracts with various temporary agencies for temporary workers (Tr. 7:1046–1048; 9:1229; 10:1475), or, on occasion, obtains loaned or borrowed (Tr. 9:1280, 1405; 10:1462, 1600–1601) workers for 2 to 3 weeks. For example, during May–June 1994, Sink testified, Salem contracted with Options for temporary employees because Salem had three big short-term projects. (Tr. 7:1047, 1051, 1057; 10:1475; GC Exh. 112.) The three big projects were Salem College, Wake Forest University, and Crest Tobacco. The Crest Tobacco job was in Tobaccoville, a town some 20 miles "up the road" from Winston-Salem. (Tr. 7:1047–1048; 9:1246, 1386.)[5]

As Salem's business grew, Sink, who is in charge of operations (Tr. 7:1045), needed help with the hiring process. Before 1989, Myers testified, he would hire some employees, Sink would hire others, and insufficient controls were in place. Moreover, both Myers and Sink had other duties. (Tr. 7:1183.) To solve the problem, in 1989 Salem promoted James Manuel to general superintendent and assigned him to assist Sink with the hiring, among other matters. (Tr. 7:1183–1184; 9:1224, 10:1568.)

C. Introduction To The Union's Salting Campaign

The principal allegation is complaint paragraph 15 which alleges that Salem "failed and refused to consider for hire and/or hire" 66 named employees on various dates, all but one of which fall in 1994. Paragraph 15 actually has 67 entries for the names, but as Allen W. Craver appears for both the first date and the last, his name appears twice. (Tr. 1:18.) Thus, there are 66 applicants named. As amended at trial (Tr. 1:17–19), the first refusal date in complaint paragraph 15 is alleged to be February 14, 1994. The last is September 30. The single date outside 1994 is a third date, May 8, 1995, for Kim Farley.

The 1994 dates fall into three timeframes. The first of these runs from February 14 to March 22, with 48 employees participating (and with several of the 48 participating in later dates, as well). The second time period, and in fact the second group (three employees) affected, is the single date of June 10. Finally, the third time period begins on August 22 and concludes on September 30. This third group consists of 15 named individuals not named previously, plus Craver and some 12 others who appear in the first and second groups.

As I discuss in a moment, most of the applicants did not personally appear at Salem's office and complete their applications there. Instead, during COMET classes,[6] and at other times, at the Union's hall they filled out blank copies of applications, which the Union had obtained, and then Business Manager Gary M. Maurice or other members of the Union hand deliv-

[5] I take official notice that, on North Carolina's 1995 official state map, Tobaccoville is shown as being a few miles northwest of Winston-Salem.

[6] At the COMET classes, members attended lectures regarding employee rights under the Act, and received training on how to function as volunteer organizers, including that done in a salting campaign.

ered these applications (made on photocopied forms) to Salem. Most were delivered in two "batches." "Batch" is a term which is more convenient than descriptive, for the first "batch" covers applications received during the period of February–March 1994. The term "batch" apparently originated from Manuel's retaining the off-premises applications in "batches" in a drawer of his desk. The batched off-premises applications began arriving in February.

Observing that the batched applications failed every component of Salem's rule number one (apply in person, complete an original application blank at Salem's office, and be available for interview at that time), Sink directed General Superintendent Manuel to keep these documents in his desk separate and batched because they were not legitimate applications. (Tr. 9:1292–1293, 1346, 1348–1349, Sink.) In a drawer of his desk, Manuel places (legitimate) applications on one side of a divider. On the other side of the divider, Manuel places all putative applications such as faxes, resumes, and would-be applications on copied blank forms. (Tr. 10:1573–1574.)

Clearly, if the evidence fails to show that, before February 1994, Salem loosely applied its rule number one, and began to apply it strictly when the Union salters began applying in numbers in February, then the Government will be unable to establish a prima facie case as to most of the 66. To show that Salem in fact applied the rule (or at least part of it) loosely before February 1994, and indeed well into the Union's salting campaign, the General Counsel relies largely on the testimony of Robin Gilchrist, Salem's receptionist during this period.

D. Salem's Hiring Policies

1. Introduction

Controversy over Salem's hiring process is at the heart of the case. Three aspects are involved, with the first being the application process, the second being Salem's hiring criteria, and the third being the hiring decisions. The Government neither alleges nor argues that any of Salem's application or hiring requirements is, by itself, unlawful. Rather, the General Counsel contends that Salem used, or invented after the fact, several of these requirements as pretexts to avoid hiring applicants who are either clearly affiliated with the Union or who have a union background. In so contending, the General Counsel largely relies on evidence of asserted disparity. Salem argues that the evidence fails to support the General Counsel's contentions.

There is no dispute that it is Manuel and Sink (occasionally Myers participates) who make the decisions on interviewing and hiring.

Finally, when asked about Salem's "policy on unions," Myers testified that Salem has no policy, as such, but that the Company's philosophy could be expressed as, "We don't think that unions have anything to offer the Company or the employees and we would resist it within the law." (Tr. 7:1190.) Sink was not asked. When the General Counsel asked Manuel, Manuel responded (Tr. 10:1602), "The IBEW doesn't have anything positive for the Company, to my knowledge." The sentiments expressed by Sink and Manuel are, of course, entirely lawful.

2. Receiving and handling applications

There is no dispute that blank applications are kept by the receptionist and normally are given out by the receptionist to job applicants. When the receptionist goes to lunch or for a break, one of the other office employees will handle the task of giving out applications. According to Salem's witnesses, once the application is completed the receptionist gives it to Manuel or to Sink, whichever is available, who decides whether to interview the applicant or to file the application for later consideration. Completed applications eventually are given to Manuel who keeps all completed applications in a drawer in his office desk. On this latter point there is some dispute, with Robin (Gilchrist) McIntosh, the person who was the regular receptionist during her employment at Salem from early 1992 to June 1994 (Tr. 4:598, 612, 629), testifying (Tr. 4:606, 621–623) that she kept completed applications in her desk drawer until Manuel called for them. She also testified to other procedures which differed from the policy described at trial by Salem's witnesses. I address these important disputes in a moment. [While she was at Salem, Robin's surname was Gilchrist. At some point after she left Salem, Robin's surname changed to McIntosh, and (Tr. 4:597) that is the name she now uses. However, as the witnesses knew and referred to her either by her given name of Robin or by the surname of Gilchrist, and the parties, on brief, generally refer to her as Gilchrist, and to avoid confusion, I refer to her here by her name during the relevant events, Robin Gilchrist.]

3. The application process

a. *Salem's rule number one*

In the application process, Salem's number one requirement is really threefold. First, the job applicant must appear in person at Salem's Stratford Road office. Second, while there the applicant must complete one of Salem's original (not photocopy and not a faxed copy) application forms. Third, he or she must be available for interview while on the premises. (Tr. 7:1185, Myers; 9:1241–1242, 1245, 1385, 1552, Sink; 10:15701571, Manuel.) This number one rule, or policy, has been in effect since 1990. (Tr. 9:1243, Sink; 10:1569–1570, Manuel.) As the receptionists handle applications, they have been told that this is Salem's policy, Sink testified. (Tr. 9:1243.)

As described (in varying degrees) by Myers (Tr. 7:1185), Sink (Tr. 9:1243; 10:1453–1455), and Manuel (Tr. 10:1571, 1588), there are several reasons for rule, or policy, number one. First, by personally appearing, as opposed to calling, mailing, or faxing a resume or application, the applicant shows personal interest and initiative. Second, the personal appearance gives Salem's hiring managers (Sink and Manuel) an opportunity to avoid a lawsuit alleging negligent hiring. For example, both Myers and Sink describe situations in which the breath of an applicant has added to the interview the fragrance of "air du ferment"—the fermented aroma of too many beers the night before. Third, Salem wants to know that an applicant can read and write, for an electrician must be able to do both. Finally, the personal presence requirement ensures that the applicant will be available for immediate interview and, if appropriate, hiring on those occasions when Salem's hiring needs coincide with an applicant's luck on being at the "right place at the right time."

On brief (Br. 78–79) the General Counsel argues that Salem's threshold rule (Salem's rule number one) is "suspect," and the supporting reasons "largely fictional," on several grounds. First, Salem has an opportunity to interview an applicant [who, for example, mails an application] before he or she is hired and therefore could then observe any outward manifestations of drugs or alcohol. Moreover, Salem's drug screening would catch any illegal drugs. The simple answer to this is

that, since 1990, Salem has followed its own business practice without any help from the Government on how best to hire quality employees. Salem apparently prefers its procedure to that suggested by the Government. Stated differently, the issue is not what Salem could do, even if the Government's suggestion somehow made more business sense (it does not). The issue is whether the evidence shows that Salem disregarded its own business rules in order to discriminate against potential supporters of the Union.

Second, at the interview the manager "could" (Tr. 10:1453) ascertain whether the applicant can read or write. Just how the manager could do this is not specified on brief, but at trial two questions suggest the Government's idea of a better procedure. The first question, which was modified after an objection, would have asked Manuel to confirm that the W-4 tax withholding form, the immigration I-9 form, and the insurance forms that are filled out (after hiring) would be "another checkpoint along the way to see if someone could read and write." (Tr. 10:1589.) [That is, to confirm from forms completed after the applicant has been hired that which Sink and Manuel want to know before they decide to hire!!] The revised version asked whether, at the interview, Manuel or Sink "could" (point blank) ask an applicant (the embarrassing question) (Tr. 10:1590): "Can you read and write?" Yes, Manuel impliedly answered, it could be done. As noted a few lines earlier, this case is not about such silliness, or whether a Federal agency can substitute its business judgment for that of a private business owner, but whether that private business has disregarded its facially valid business procedures in order to avoid hiring applicants perceived as likely to support the Union.

Third, the testimony, express and implied, of Manuel (Tr. 10:1586–1587) and Office Manager Jeri Stafford (Tr. 10:1612–1613), establishes that nothing is posted in the lobby advising job seekers of rule number one. That lack of posting is in contrast with the posting, on the front door, of Salem's policy that employment is contingent on passing a drug screening. (Tr. 10:1587, 1590, Manuel.)

All this leads to the conclusion, the General Counsel "suggests," that Salem has merely attempted "to construct an after the fact pretextual excuse for its discriminatory conduct." The Government does not allege or argue that Salem's rule number one is facially invalid. Rather, the General Counsel impliedly argues that the rule either was invented after the events, or if it preexisted, it has been rendered meaningless by numerous acts of disparity. Crediting Myers, Sink, and Manuel on this point, I find that Salem's rule number one has existed since about 1990. The issue, therefore, is whether the evidence demonstrates that Salem administered its rule, or policy, with that disparity which shows an unlawful purpose. That is, disparity which shows that Salem applied the rule loosely as to applicants considered to be nonunion, but strictly as to those thought to be supporters of the Union.

The Government's disparity evidence appears to consist of incidents involving three employees: Michael Bobbitt, Danny Norfolk, and Stephen Necessary. I address these, in turn.

Bobbitt's application (GC Exh. 121) was identified during the cross-examination of Myers. The application is typed (Tr. 7:1194), and Myers concedes that Salem's typewriters normally are not made available to applicants for their use. (Tr. 7:1193–1194.) Myers was unable to say whether the application had been typed elsewhere (Tr. 7:1195), but testified that the handwritten note, on the face of the application, reading "Temp start 2-18-94," indicates that Bobbitt was hired (Tr. 7:1195). [Myers explains that "temp" means temporary, or probationary, and that all employees are hired on a probationary period of 90 days. It does not refer to a temporary employment agency. Tr. 7:1195.] The General Counsel offered the document for the purpose of impeaching Myers' testimony (Tr. 7:1185) that all job applicants must appear in person and complete the application at Salem's office, and I received it on that basis. (Tr. 7:1200.)

Salem asked no questions of Myers on redirect examination (Tr. 7:1197). However, Sink explains the situation. Bobbitt, it appears, is a distant relation of General Superintendent Manuel. Manuel's son, Tony Manuel, is a supervisor for Salem at the R. J. Reynolds plant at Tobaccoville. Somehow, Tony Manuel got one of Salem's blank application forms. He and Bobbitt completed the application on a typewriter. Although Bobbitt had to go through the interview process the same as everyone else, the at-Salem's-office completion requirement "slipped through the crack," as Sink expresses it. (Tr. 9:1246.) Of the 350 applications which Salem received in 1994, Sink testified, Bobbitt's is the only one that is typed. Moreover, Sink does not know of anyone else who was hired based on an application that was completed off the premises. (Tr. 9:1246.)

I find no disparity based on the Bobbitt situation. With aid from an insider, such aid based on a family relationship with General Superintendent James Manuel, Bobbitt's application was typed off the premises by virtue of a gap in the security of the application process. That process was not foolproof, and Tony Manuel exploited it for his relative's advantage. That isolated instance, arising from a blood relationship with the family of General Superintendent James Manuel, does not establish relevant disparity. Nonunion applicants not blood related to James Manuel fared no better than the union applicants—all had to complete their applications on the premises. Thus, to the extent that Bobbitt's situation would serve factually to impeach Myers by an isolated example, it does not do so legally because the disparity, aside from being extremely isolated, is disparity based on an irrelevant difference. That is, favoritism was given based on blood relation. It was not favoritism based on nonunion status while disfavoring union status.

Danny E. Norfolk worked for Salem some 6 months in 1993 as a top helper before being laid off in August. (Tr. 2:301.) Although Sink denies it (Tr. 9:1244), I credit Norfolk that, in very early May 1994, Norfolk returned a call from Sink. Sink asked whether Norfolk would like to return to work for Salem on May 6. Norfolk asked if he could wait until the following Monday, May 9, because of the work he then was doing for another electrical contractor. That work was concluding and Norfolk was about to be laid off. Sink agreed to May 9. (Tr. 2:330.) On May 9 Norfolk went to Salem's office where, apparently, both Sink and Manuel told him he would have to complete a Salem application. Before doing so, however, Norfolk was hired by Manuel (Tr. 2:304), took a drug test, and began work the next day, May 10. Norfolk did not complete his application until the following day, May 11. (Tr. 2:305.) On May 18 Norfolk was injured on the job, returned to work about 3 weeks' later, and was terminated about a week after that, or about June 23, in a money-related dispute with Salem. Norfolk joined the Union in July 1994.

While Norfolk's hiring without benefit of a contemporaneous application shows disparity, it is the only example of such. Given Salem's continuing need to hire apprentices, and Salem's

preference for former employees with a good record at Salem (Tr. 7:1193, Myers), Sink's call soliciting Norfolk's return is not entirely surprising notwithstanding Sink's testimony (Tr. 9:1244) that he has never called anyone at home who has not left a completed application. In any event, the primary issue of disparity lies in the hiring without benefit of an application. While Norfolk's preferred status as a former employee helps to explain the favorable treatment he received, it also shows that, on at least one occasion during the past several years, Salem was willing to relax, temporarily, the strictness of its hiring policy to accommodate its own needs. Norfolk's hiring may tend to support the General Counsel's case, but more than that one example of limited disparity is needed.

The third example of disparity advanced is based on one aspect of Stephen Necessary's testimony. Because of his work as an estimator and shop supervisor with a sibling company of Salem, Necessary knew Sink and Manuel. (Tr. 6:944.) On May 17, 1994, Necessary went to Salem's office seeking work. Sink gave him an application to fill out. To Necessary's question of whether he could take the application home to fill out, Sink said no, to do so on the premises, that Salem was "having a bit of union problems and did not want the application to leave the office." (Tr. 6:936.) Acknowledging that he may have told Necessary that he could not take the application out, Sink denies that he referred to the Union or that Salem's policy is related to unions. (Tr. 9:1244–1245.)

While I credit Necessary's testimony on this point, Sink's May 17 reference to unions is consistent with an interpretation that Sink was merely emphasizing the need to assure the security of Salem's applications, and was not a statement that the policy is not enforced when unions are not around. Accordingly, I attach no significance to Sink's remark.

Having summarized the examples of possible disparity, and finding no relevant or material disparity, or disparity of significance, I find that Salem's rule number one is left intact.

b. Highlighting and the requirement of originals

According to Gilchrist, she gave out multiple copies if someone asked for extras for friends, and received multiple applications (for more than one person) from a single applicant, and when her supply of blank applications ran low, she made photocopies which she distributed to applicants. (Tr. 4:603, 611–612.) Gilchrist identified a blank application form (GC Exh. 26) as the type application which she distributed. That document, General Counsel's Exhibit 26, has no highlighting on it and no control number. However, Sink asserts that since 1992, when Salem began its drug screening, it has highlighted (apparently manually with a pink or fluorescent yellow highlighting pen) a two-line portion, about one fourth the way down of the first page of the application, which advises applicants that employment with Salem is contingent on successful completion of a drug screen. Moreover, Sink is fairly certain that by 1992 that control numbers were being written in the upper right hand corner of each blank application, and highlighted.

Sink identified a blank application (R. Exh. 22), with such portions highlighted (fluorescent yellow) and the control number 677, as a sample copy, and the December 7, 1994 original application (R. Exh. 26, bearing a control number of only 38, with pink highlighting) of Carlton Vaughn. As Sink was not able to state that he personally knew that each blank application had received such manual modifications since 1992, I received Respondent's Exhibit 22 on the limited basis that it is a sample of Salem's policy, not necessarily its consistent practice. (Tr. 9:1231–1240.) Office Manager Stafford confirms that the highlighting is done, but her description is about current practice rather than addressing the history of the practice. (Tr. 10:1607.)

Earlier applications which are in evidence are copies. Thus, Respondent's Exhibit 2, the June 5, 1992 application of Timothy W. King, is only a photocopy, and therefore bears no color highlighting. It does, however, reflect a smudge mark across the two lines pertaining to the drug screen requirement, thereby indicating that the original was highlighted. The four-digit number in the upper right hand corner may well be an employee number rather a control number. First, there is no smudge indicating that the four-digit number was written over a strip of highlighting. Second, Kelly Cartner, an accounts receivable clerk who has substituted for years as a receptionist, suggests that such four-digit numbers may be the employee number rather than a control number. (Tr. 10:1630–1631.) [In fact, the numbers on other applications suggest that the four digit numbers are the employee numbers.] There is no other number in the upper right hand corner. Thus, I find that there is no control number on King's application.

Other witnesses of the General Counsel testified concerning the matter. Some testified that they remembered no highlighting, or that there was none, but most received copies from the union hall and those copies had no highlighting, as I will cover later. Earlier I mentioned that Stephen Necessary was hired and worked 1 day. Necessary could not recall whether the original of his application, a copy of which is in evidence as General Counsel's Exhibit 108, had a highlighted portion. (Tr. 6:939, 945, 948.) Although acknowledging (Tr. 6:945) that the copy in evidence has a smudge across the drug screen portion [but no smudge over the apparent control number, an incomplete number beginning with a 2, in the upper right hand corner], Necessary observed that his application could have been highlighted at some later point (Tr. 6:946). Carlton Vaughn suggests the same as to the original (R. Exh. 26) of his December 7 application. (Tr. 7:1142.) That could be so as to the preprinted portion of the drug screen lines, but use of the damp highlighter on an inked control number could well result in the control numbers being smudged. The control number, or that part which appears on General Counsel's Exhibit 108 (a photocopy), does not appear to be smudged, and it is not on the original (R. Exh. 26) of Vaughn's.

Jeffrey A. Wyatt's June 1, 1994 application (GC Exh. 109), the copy that is in evidence, has no control number, but only an employee number in the upper right hand corner. The drug screen lines are blotted out by a heavy black marking, indicating that either the original was that way or, more likely, that the original had a highlighting other than yellow, one that some photocopiers might show as dark, such as, possibly, pink. According to Wyatt, when he completed the application, there was no bold black line through the form. (Tr. 6:954.) Of course, the original probably would have been in some highlighting other than heavy black. I also note that Wyatt, who initially testified that everything was in his handwriting (Tr. 6:954), subsequently admitted that he did not write the notations about "Tem" and starting date and wage rate and the employee number in the upper right hand corner (Tr. 6:955).

Neither party really followed through on the highlighting issue. That is, neither party dug into files and produced original applications filed in, say, 1993, or even January 1994, to dem-

onstrate clearly whether the highlighting was there or not and whether a control number was there or not. As to the control number, Sink was unclear concerning the numbering system and whether Salem may have started over after reaching 1000. (Tr. 9:1238–1239.) Moreover, no description was given regarding whether there is a register book containing the "control" numbers. From the lack of description, I infer that there is none. Indeed, Kelly Cartner testified that, when substituting as the receptionist, she simply adds new sequential numbers by hand when the existing supply of application blanks begins to run low. (Tr. 10:1626–1627.)

On brief the General Counsel argues (Br. 78) that the Government's witnesses should be credited over those of Salem. Such crediting would lead, the General Counsel argues, to rejection of Salem's primary defense that the applications in issue were not legitimate. Although not articulated, the argument apparently is that the rejection would be on the basis that there really was no highlighting policy, or if so, it was honored more in the breach than in the observance. A finding to that effect would mean, apparently, that unmarked copies of blank application forms were legitimate application blanks. That being so, then the copies submitted by the Union or its members could not be rejected, or given no consideration, on the basis that they were not on an original blank form, especially a highlighted blank.

In its reply brief, Salem lists nearly 20 copies of applications in evidence reflecting, by varying degrees of smudge or heavy dark marking, that the drug screen lines of the originals were highlighted by differing colors. Salem asserts that whether all applications were highlighted is not a material issue. "The policy at issue is Salem's requirement that applicants personally complete the application at Salem's office." After observing that only 5 of the 66 testified that they personally completed an original application at Salem's office, with all others admittedly filling out copies of the applications received at the union hall, Salem (Reply at 4–5) then asserts that it "need not establish one hundred percent consistency in highlighting to establish that the alleged discriminatees did not comply with Salem's in-person requirement."

To some extent, I agree with both parties. Finding that the highlighting policy was in fact a policy, at least regarding the drug screen lines, I further find that Salem did not consistently oversee the practice regarding the policy. As a result, particularly during the tenure of Robin Gilchrist as the receptionist, unhighlighted copies of Salem's job application blanks were distributed frequently.[7] Although the General Counsel alleges Gilchrist to have been a statutory agent of Salem, I find the evidence lacking in that regard as to any idea of general agency. However, there is no question that Gilchrist was a statutory agent in her handling of the job applications and respecting any questions which she answered respecting those documents. *AMI*, 319 NLRB 536, 540 (1995) ("clerical employee"); *Diehl Equipment Co*., 297 NLRB 504 fn. 2, 506–507 (1989) ("Beryl Dyer, seated at a desk immediately inside the entrance.").

Although the question of whether Salem had and enforced a policy of personal appearance at Salem's office to fill out an application is the more important issue, testimony about the highlighting could bear on credibility. Unfortunately, the parties did not fully litigate this issue. This is so notwithstanding there are many documents (mostly photocopies) in evidence related to the issue. The point is that the parties litigated around the issue, but did not get to the heart of the issue—the original applications of a large enough sample over an extended period of time beginning by no later than early to mid-1993. With some evidence supporting each party, and the critical evidence not developed, I simply will not use the highlighting issue to assist in resolving credibility. By these findings above, however, I have determined that Salem was not at liberty to ignore applications of the 66 which were on photocopies of blank job application forms. By its loose practice regarding copies during the time relevant here, Salem has waived that portion of its rule number one. The personal appearance component of the rule is a different question.

c. The personal appearance requirement

Earlier I discussed the General Counsel's disparity evidence and concluded that Michael Bobbitt's off-premises application was not relevant disparity because it involved (1) a gap in the security of the applications (and recall that Salem received 350 applications in 1994), and (2) General Superintendent Manuel's son, a supervisor, assisting a family relation by obtaining an application blank and assisting his distant cousin in typing it off premises. The disparity favored the cousin on the basis of family relationship, not on the basis of union considerations.

While Danny E. Norfolk's situation shows disparity, I concluded that his one example (involving the always-needed category of apprentice, and a former employee at that) was not sufficient to neutralize Salem's rule number one. Indeed, one example of disparity out of 90 hires during the last 10.5 months of 1994 (RX 28) is an error margin of only .011 percent. It means, on the flip side, that Salem's hiring procedures, during that relevant period of 1994, operated at virtually 100 percent integrity. And if the 136 hires for 1995 (RX 30) are added, the error percentage for the 226 hires drops out of sight at .0044. Statistically, that is operating with total integrity.

Actually, on the point under discussion, personal appearance, there is, at most, only limited disparity. That is, although Sink inquired by telephone about Norfolk's interest in returning to work at Salem, and arranged the interview and reporting date for May 9, 1994, it was Manuel who did the actual hiring after Manuel, Norfolk reports (Tr. 2:304), interviewed him, or spoke with him to some extent, at Salem's office.

Aside from the (insufficient) disparity evidence, the Government relies on the actions of the receptionists (regular and substitutes) as agents, and Office Manager Jeri Stafford as an admitted (Tr. 5:703; 7:1151–1152) agent. That is, in accepting applications on photocopied forms, the agents did not advise the person delivering the forms (sometimes in a "batch") that such documents would not be considered as legitimate applications. The agents did not advise that the documents were not legitimate because they were on photocopied forms and because all applicants had to appear in person and fill out original applications at Salem's office. That is, the General Counsel argues that it was Salem's burden to repudiate any allegedly unauthorized acts regarding the applications by calling the applicants, or the Union, and giving them personal notice. In effect, the General Counsel argues that Salem, in failing to

[7] Salem's application forms do not have preprinted statements informing applicants that: (1) only Salem originals are valid; (2) applicants must appear in person so as to be available for immediate interview; and (3) applications are "active" for 60 days only.

telephone (or write) the applicants, or the IBEW, ratified the action of the receptionists and Stafford. (Br. 73–74, 79.)

Salem disagrees, arguing that the clerks, even if statutory agents for dispensing and receiving the applications, cannot modify Salem's hiring policies, and, by merely carrying out their clerical duties, cannot give any applicant a reasonably formed belief that Salem's management has invested the clerk with the authority to describe Salem's hiring policies (and, therefore, to bind Salem to that description even if the clerk has misstated those policies). (Reply Br. 12.)

Salem's concluding statement goes right to the heart of the issue (Reply Br. 13):

> Even if agency were established, the undisputed record shows that Salem, through Sink and Manuel who were the only Salem employees involved in the hiring process, uniformly and routinely enforced the in-person hiring pre-condition. At best, agency would supply an isolated comment inconsistent with clear company policy; however, such a comment cannot undermine the constancy of the in-person condition when all evidence in the record shows that the policy was unremittingly enforced. Consequently, the statements attributed to Gilchrist and the other office clerical workers do not jeopardize the in-person application requirement.

So, does the record show, without dispute, that Sink and Manuel "uniformly and routinely enforced" the in-person requirement? Were any comments by Gilchrist and other workers merely aberrations in the face of a record showing that Salem's in-person requirement was "unremittingly enforced"? Such bold proclamation creates high expectation. Let us turn now and see whether the strength of the evidence matches the promise of the rhetoric—or whether it exposes the promise to be more wishful reverie than accurate description.

First, recall the credited testimony of Robin Gilchrist that, during her some 30-month (1992 to June 1994) tenure as the regular receptionist, she routinely photocopied application blanks when the forms ran low, distributed those copies, and took the completed ones (including, it appears, those completed on photocopied forms) to James Manuel. For applicants not hired, Gilchrist filed, by date sequence, their applications in a drawer of her desk. With one exception, to be noted shortly, Gilchrist received no instructions from management, including Stafford, concerning what to do with the applications. It apparently was other clericals who told Gilchrist what she was to do with the applications. At times when an applicant, with an application on file, telephoned and spoke with Manuel, Manuel would come to Gilchrist and ask for that person's application. If that person then came in and was interviewed by Manuel, or for any applicant interviewed by Manuel, the person was either hired or not hired. If the person was hired, Gilchrist gave him a W-4 form and other forms to fill out. Gilchrist submitted all those papers to Nonie Sink who, apparently, prepared a personnel file for the newly hired person. If the person was not hired, Manuel returned the application to Gilchrist who filed the application in her desk. (Tr. 4:603–606, 621–624, 635–636.) Based on her experience while working for previous employers, Gilchrist, at Salem, kept applications filed in her desk for 6 months. No one from Salem told her to do otherwise. (Tr. 4:606, 634–635.)

Gilchrist also gave out extra blank forms when an applicant said he wanted to take one to a friend. (Tr. 4:611.) For the return process she did likewise, accepting from an applicant the completed application of another person not present. (Tr. 4:611–612.)

There is no evidence that management ever gave Gilchrist written instructions on how to handle job applications. Indeed, there is no evidence that management ever placed such written instructions at the reception desk even after Gilchrist left. The only modification that possibly occurred was that copies of Manuel's business card were given to the receptionist for handing to applicants. And I must infer this from applicant Kim Farley's description of his May 8, 1995 visit to Salem's office. On that occasion the "unidentified secretary" who took Farley's application (R. Exh. 37), gave him Manuel's card (GC Exh. 94) and told him to call back at 4 p.m. to speak with Manuel. (Tr. 5:766–770.) Based on Salem's objections, the General Counsel limited his offer of the evidence to show the basis for subsequent action by Farley of later telephoning Manuel. (Tr. 5:769–770.) Salem, however, now cites the passage in arguing that government witnesses "confirmed that they were notified that they needed to speak to Manuel regarding hiring prospects." (Reply Br. 12.)

As Salem's argument uses the citation for the truth of the evidence, contrary to Salem's objections at trial, and contrary to my limited purpose in receiving the evidence, I treat the citation on brief as a waiver of Salem's objection at trial, and I now receive the evidence for all purposes. Accordingly, I infer, and find, that at some point before May 8, 1995, General Superintendent Manuel furnished a stack of his business cards to the then regular receptionist and all substitute receptionists. I further find he told them that, when he was not available for an interview, to give the cards to applicants and to tell them to call for him at a later time.

In addition to the limited tightening of the receptionist's job application procedures as reflected by Manuel's instructions regarding distribution of his business card, Vice President Sink testified that, on several occasions, he announced to workers that no copies were to be distributed (Tr. 9:1243, 1251), that applications were not to leave the premises (Tr. 9:1245, 1251), and that the receptionist is to hand an application to a job seeker, receive the application back, and submit the completed application either to Manuel or to Sink (Tr. 10:1458). Sink concedes that he has not put the instructions in writing. (Tr. 10:1458.) Moreover, nothing is posted in the lobby or given to applicants that would advise them of Salem's policies regarding applications. (Tr. 10:1612–1613, Stafford.)

Notwithstanding Sink's assertions about his announcements to the workers, Office Manager Stafford does not recall hearing Sink ever say anything about applications leaving the premises. (Tr. 10:1611.) While the week before her testimony she told an applicant that the application had to be filled out in the office, she concedes (Tr. 10:1613) that she does not recall telling anyone that in 1994. At one point Stafford asserts that Salem accepts whatever an applicant tenders, including photocopies, even though they are not considered legitimate documents, because Salem accepts the documents the same as it does "junk mail." (Tr. 10:1608, 1612–1613.) Yet, almost in the same breath, Stafford claims that the receptionists are told during their training not to accept applications that come in from outside the office. (Tr. 10:1613.) Stafford was unconvincing. In any event, I find that she never told Robin Gilchrist not to accept applications that come in from outside the office.

If Stafford does not remember Sink's announcing to workers about Salem's rule number one, Kelly Cartner asserts that she

has heard him say it several times during her employment that began in 1986, including either 1993 or early 1994. (Tr. 10:1617, 1619–1621, 1623–1624, 1626, 1629.) According to Cartner, Robin Gilchrist "probably" heard it. (Tr. 10:1620.) Even if Gilchrist was not present when Cartner heard Sink make his announcements, "I know Robin heard that comment made." (Tr. 10:1630.) [I note that Cartner has progressed from "probably" to "I know."] Cartner does not describe the basis of her knowledge of what Gilchrist heard. While I credit Cartner that Sink made such statements from time to time (they were not announcements to gatherings of employees, Tr. 10:1629), I attach no weight at all to her unsupported conjecture that Robin Gilchrist had heard Sink make such a statement on some unspecified occasion. Thus, there is no credited evidence that Sink, Stafford, or any person at Salem, management or rank and file worker, ever told Robin Gilchrist.

Despite Sink's occasional statement to one or more workers about one or more components of Salem's rule number one, it is clear that Salem policed its rule with far less attention than any prudent employer gives in protecting itself against overtime liability under the federal wage and hour law for "suffering" hourly employees to work unpaid through their lunch periods during a regular 40-hour week. In our case, Salem failed to take whatever steps were necessary (and one such prudent step would be written instructions) to ensure that the regular and substitute receptionists were aware of their specific duties, and restrictions, regarding job application procedures.

Although Robin Gilchrist apparently, on occasion, accepted photocopied applications, there is no evidence that either Manuel or Sink was aware that some applicants were able to bypass the in-person requirement. Any errors by Gilchrist are just that—errors by Gilchrist. If we were considering an allegation that Gilchrist had made an unlawful threat (such as, "We don't hire union people"), that would simply turn, as with any statutory agent, on whether Gilchrist said it. But on the subject of hiring, Gilchrist's knowledge of what she did is not imputed to Manuel and Sink when, as the evidence shows, they were not aware that she was accepting some applications for persons who had not made a personal appearance. As it was Manuel and Sink, and not Gilchrist, who made the decisions on hiring, it is their knowledge and motivation that is determinative. Finding no knowledge on their part that Gilchrist sometimes was improperly accepting applications for persons who had made no personal appearance, I find that the in-person component of Salem's rule number one remained valid at all relevant times.

Although Salem's in-person requirement will have a strong impact on the analysis to be given the status of the applications filed on behalf of many of those named in the complaint, I defer that discussion until later.

4. The 60-day rule

a. Facts

A person's application is "active" for 60 days, although Salem retains applications for 1 year under Salem's understanding of requirements by the EEOC. (Tr. 9:1252–1253, Sink; 10:1591, Manuel.) Occasionally Salem reaches outside the 60-day active period, but when it does so, it generally is within the next 10 days. (Tr. 10:1457, 1479, Sink.) Most of Salem's hiring is done within the first 10 days of a person's application. (Tr. 9:1252, 1410–1411, Sink; 10:1575, Manuel.) When Salem turns to the applications on file, it (meaning Manuel, usually) starts at the top, or most recent application, because those persons can be found the quickest and are more likely to be available than the persons who filed applications earlier. (Tr. 9:1282; 10:1544, 1564–1565, Sink; 10:1574–1575, 1591, Manuel.)

Charts or lists in evidence (GC Exhs. 117, 118; R. Exh. 28) list all 90 employees hired from February 14, 1994, through the balance of 1994. Sink testified that the average number of days from the application date to the hire date computes to 9.60 days. (Tr. 9:1260; R. Exh. 28 at 3.) Similarly, for the year 1995, the average time lag was 10.33 days from the application date to the hire (or offer, in the case of those who never showed) date. (Tr. 9:1279; R. Exh. 30.) In fact, as Sink explains, if the five high school work-study ("career center") student-employees on the 1995 list are disregarded (because the students have a big gap between their applications and hire dates, Tr. 9:1263–1264, 1269–1271), the average time lag drops from 10.33 to below 9. (Tr. 9:1271, 1279, Sink.)

On the 1994 list (R. Exh. 28), only two names reflect hire dates beyond Salem's 60-day active period for applications—Michael R. Paschal (103 days, hired May 9 as an apprentice) and Milton T. Garwood (64 days, hired October 13 as an apprentice). As Sink explains, Paschal, who has several relatives working for Salem, was hired late when a new project opened calling for the extra skills he possesses in the operation of backhoes and other equipment. (Tr. 9:1261–1262.)

Garwood, a former Salem employee, had applied earlier in 1994, in March (GC Exh. 132; R. Exh. 35 at 4), but was rejected because of a poor work record and an unstable work history. (Tr. 10:1508, 1513; R. Exh. 35 at 4.) Persistent, Garwood applied a few months later, on August 10. (Tr. 9:1262; 10:1511; GC Exh. 133.) Sink testified that he saw Garwood checking on his application almost weekly. (Tr. 9:1262; 10:1511.) After checking again on October 11 (R. Exh. 32 at 7; 10:1512), Garwood was hired on October 13 (Tr. 10:1511; R. Exh. 32 at 7). In view of Garwood's poor work record and unstable employment history, Sink "assumes," but does not know, that Garwood simply walked in on the right day. (Tr. 10:1511–1513.) Garwood was hired at $10.30 per hour as a "top helper," the highest level in Salem's apprentice classification. (Tr. 7:1046; 10:1549; R. Exh. 32 at 7.)

Pascal's hiring, while not a necessity, has a reasoned explanation for the departure from Salem's 60-day hiring policy. Salem simply decided to hire a person who had additional skills other than electrical.

Garwood, on the other hand, had nothing to recommend him other than persistence and, apparently, being at the right place at the right time and therefore was hired to satisfy Salem's needs at the moment. But if Salem hires only the most qualified for a position (Tr. 9:1284, 1367, 1414; 10:1464, Sink; Salem's Br. 39), why would Salem hire Garwood? In any event, I note that, while Garwood was hired beyond the 60-day period, he did come within the 10-day extended period, or grace time, in which Salem sometimes hires.

Turn now to the 1995 list. (R. Exh. 30.) When the students are not considered (a reasonable exception), only one person was hired beyond the 60-day period—Richard K. Fennell, a former employee, at 98 days as a journeyman. As did President Myers (Tr. 7:1193), Sink testified that Salem favors hiring former employees (Tr. 9:1279), that Fennell checked on his March 1995 application (R. Exh. 38) several times, a positive factor, and when a position came open in June, Salem hired him. (Tr.

9:1279, 1400.) Fennell started work on June 13, 1995. (R. Exh. 30 at 4.)

b. Discussion

The integrity of Salem's 60-day policy, when applications remain active, is a critical issue. If that policy withstands the Government's attack, the policy renders stale most of the applications filed by the 66 because they were older than 60 days when Salem resumed hiring. An "active" period for job applications (whether the period is for 60 days, 10 days, or whatever time) is lawful providing that the policy was not adopted for an unlawfully discriminatory purpose and providing that the policy is not applied in an unlawfully discriminatory manner. Here, the evidence fails to establish that Salem's 60-day policy was unlawful at its inception. The question, therefore, is whether Salem applied it in an unlawfully discriminatory fashion during the relevant time. Actually, as application of the policy is not singled out for a complaint allegation (as sometimes is done with no solicitation rules), the question is whether Salem relies on that policy as a pretext to mask an unlawful reason for refusing to consider most of the 66 for possible employment.

As I have found, only one exception (of two) in 1994 is significant—the October 13 hiring of former Salem employee Milton T. Garwood at 64 days as a "top helper." Similarly, in 1995 I have found but a single significant exception—the June 13 Hiring, at 98 days, of former employee Richard K. Fennell, as a journeyman. Had Salem permitted no exceptions, my inquiry would stop. Because Salem permitted these exceptions, limited though they are, I now must consider whether these two discretionary exceptions to Salem's 60-day rule, Garwood in 1994 and Fennell in 1995, nullifies Salem's 60-day policy.

I note that the margin of error, if the Garwood and Fennell hirings can be called errors under the 60-day rule, is very small. Thus, from February 14 through the close of 1994, Salem hired 90 employees. (R. Exh. 28.) In mathematical terms, that is an error rate of just 1.11 percent. Stated differently, it shows successful adherence to the 60-day policy at just barely under 99 percent of the time. Even if only the apprentices or helpers hired in 1994 (68 of the 90) are considered, the error rate still is only 1.47 percent, or a success rate exceeding 98 percent. Salem strongly argues that such percentages are far more consistent with a good faith effort to comply than with any pretextual motivation to discriminate. Indeed, before citing the 1995 numbers, I note that, while Garwood was hired outside the 60-day period, he came within the additional 10-day grace period which Salem sometimes allows.

Fennell, of course, was well beyond even the 10-day grace period. Note that Fennell is a former employee, and that Salem gives preference to former employees who have a good work record. Fennell apparently fits this description, plus he continued to check on his application (another positive factor). In 1995, Salem hired 136 employees. Even if Fennell's hiring is considered an error in the administration of Salem's 60-day hiring policy, the error rate is extremely small—.0073529, or .74 percent. In terms of compliance with the policy, that is a success rate exceeding 99 percent. If the numbers counted are just the journeymen (24 of the 136; R. Exh. 30), the error rate obviously is greater, at 4.17 percent, with the success rate coming in at nearly 96 percent. Considering only the percentages pertaining to the journeymen, the numbers are still impressive, and certainly more consistent with good faith than with an improper motive. Perfection under the law is not required, and in practice it seldom is achieved. Thus, I find that, by themselves, the Garwood and Fennell exceptions, over 2 years, do not nullify Salem's 60-day policy. Nevertheless, I shall consider whether any of the 66 came to check on their applications but were turned away on the basis that their applications were beyond 60 days.

E. Salem's Refusal to Hire the 66

1. Introduction

In early 1994 Gary M. Maurice, the Union's business manager and person in charge of organizing for IBEW Local 342, launched a campaign as to Salem Electric. As much to help unemployed members obtain work as it was to organize (Tr. 1:48–50; 2:220), the campaign included sending covert and open "salts" to Salem's office seeking employment as electricians. Salting was one part of the campaign. (Tr. 2:220.) For the most part, on their applications, member applicants clearly identified themselves as affiliated with the Union and as voluntary IBEW organizers. Frequently they recorded that they had attended COMET training classes. On February 25, 1994, Maurice faxed to General Superintendent Manuel a two-page fact sheet about "Organizing Through C.O.M.E.T." (GC Exh. 21; Tr. 1:79–80.) By letter dated June 10, 1994, to Salem, Maurice sent Salem a listing of members the Union asserted had made application for employment with the Company. Beside most of their names Maurice typed a "JW"—meaning, he testified (Tr. 1:115), that the person was a journeyman wireman.

In his June 10 letter, Maurice informed Salem that:

> These applicants are well qualified in all areas of the electrical trade and are willing to work for the same wages and conditions offered your present employees. All those listed as Journeyman Wireman have been certified by the IBEW and/or the North Carolina Department of Labor as qualified, while those listed as Apprentice Wireman are indentured in a JATC through the North Carolina DOL.

One paragraph later Maurice advises Salem (GC Exh. 24):

> Also you will note that these applicants have listed that they are voluntary IBEW Organizers. I wish to assure you that each of these applicants have attended an IBEW COMET Organizing school and are familiar with the NLRA and their responsibilities while in your employ. Rest assured that they will perform an exemplary job for you and further will conduct their organizing of your employees in the manner specified by the NLRA.

At the request of Maurice (Tr. 1:48), on February 14 Allen W. Craver went to Salem's office, obtained a blank application from the receptionist, completed it, and returned it (GC Exh. 90) to the receptionist. She told Craver that Salem was not hiring at the time. (Tr. 5:736–737.) Although Salem's trial summary as to the 66 (R. Exh. 33 at 14, sequence number 109) states that Craver did not complete his application on the premises, I find such statement to be erroneous.

Maurice also asked Allan T. Samuels to make application and, if possible, to bring him a blank application form. (Tr. 1:48–49.) As a result, on February 22 Samuels, accompanied by Don H. Craft (like Samuels, a member of the Union), went to Salem's office where they both obtained applications, completed them, and returned them to the receptionist, Robin Gilchrist. (Tr. 5:681, Craft; 6:900–902, 905–908, Samuels.)

Samuels asked about an interview, and Gilchrist told him that General Superintendent Manuel was not in the office but that she would see that he got their applications. To Samuels' question of whether he could take a blank application for a friend, Gilchrist said yes. In response to another question, Gilchrist informed Samuels that applications were retained on file for 6 months. (Tr. 6:902.) I do not credit the assertions on Salem's trial summary (R. Exh. 33 at 14, items 110 and 112) stating that the February applications of Samuels (GC Exh. 105) and Craft (GC Exh. 85) were not completed on the premises.[8]

On February 22, Maurice testified (Tr. 1:49), Samuels brought him a blank Salem application form. Maurice made photocopies of the form which Samuels brought to him. At a COMET class that evening, Maurice distributed photocopies of the form to some 47-member attendees. Several attendees completed the application form and gave them to Maurice. (Tr. 1:49-50, 74; 2:199, 205–206, 241.)

Maurice recalls that he instructed Paul David Vogler to submit an application at Salem. (Tr. 1:52.) Union member Vogler recalls that Maurice gave him a blank application which, after completing, Vogler took to Salem's office and delivered to the receptionist, Robin Gilchrist, on February 23. To Vogler's question of whether there was any problem with the application being on a copied form, Gilchrist answered no. Vogler then inquired if Salem was hiring, and Gilchrist said not at that time but that he could check back in a few weeks or they would call him. Vogler called about 2 weeks' later and spoke with the receptionist. The record does not give her response, but Vogler was not offered employment. (Tr. 5:779–784, 808.)

That same day, February 23, Maurice, accompanied by union member Patrick D. Parsons (Tr. 1:52; 2:199, 204; 3:441), went to Salem's office. Inside Salem's lobby, Maurice, after inquiring whether they could fill out applications, asked the receptionist, Robin Gilchrist, if he could obtain extra application forms for two other persons who were interested. Gilchrist gave him three application forms. (Tr. 1:52–53, 59–61.) After completing one (GC Exh. 3) of the applications, Maurice gave one of his union business cards to Gilchrist, who stapled it to Maurice's application. (Tr. 1:61–62; 3:447.) Gilchrist said that General Superintendent Manuel was not available, that Maurice did not have to check back because Manuel would call him, and that applications were good for 6 months. (Tr. 1:132–133; 2:206–207.) Parsons also gave his application (GC Exh. 68) to Gilchrist. (Tr. 3:441–442.) Parsons had completed his application, on a copied form, off premises. (Tr. 3:441–442, 444, 464, 477.) As I have found, however, Salem waived its policy as to no copies.

To Maurice's question of whether he could submit completed applications of persons who were not present, Gilchrist said, "[Y]es." Maurice then handed Gilchrist the completed applications of 16 of those who had attended the Union's COMET class the night before. Thus, the 16 applications (GC Exh. 5–20), although in original handwriting, were made on photocopied forms supplied by Maurice at the February 22 COMET class. (Tr. 1:49–50; 2:199, 205–207, 241.) Gilchrist confirms that, in February 1994, Maurice gave her a stack of applications which she gave to General Superintendent Manuel. Very soon thereafter, possibly the same day, Manuel told Gilchrist to keep separate those applications bearing some indication of affiliation with the Union. At some point Gilchrist would submit applications to Manuel. (Tr. 4:614–615, 618–619.) I do not credit Manuel's version that he merely told Gilchrist to keep the copied applications separate, and to put them on his desk, and his denial that he told Gilchrist to keep the union applications separated. (Tr. 10:1575–1576, 1594–1595.)

There is no dispute that Salem received the 16 applications, as is reflected on its trial summary pertaining to the 66. (R. Exh. 33.) Aside from Salem's other defenses, what is in dispute, as to 8 of the 66, is not delivery, but authentication. As Salem writes on brief (Br. 52–54; Salem's Reply at 5–6), the applications of some 58 of the alleged discriminatees were authenticated either by testimony or by stipulation. That is, even though delivery was shown as to nearly all the applications,[9] the applications of some eight of the alleged discriminatees were never authenticated by either testimony or stipulation. The General Counsel argues (Br. 10) that authentication is unnecessary as to these eight because "Salem has acknowledged receipt." In reply, Salem argues (Reply at 5–6) that acknowledgement of receipt is not a substitute for authentication. Indeed, all such applications were received on the limited basis of showing only delivery, with authentication to come from other witnesses.

Actually, in light of my findings that Salem's in-person and 60-day active policies remained valid at all relevant times, I do not reach the authentication question, or any of the other issues pertaining to those of the 66 who are eliminated by virtue of the in-person and 60-day policies. Accordingly, my focus first is directed toward only those who appeared in person at Salem's office. Consistent with my finding that Salem waived its policy of originals only, this group, of about a dozen, include those (most of the group) who, appearing in person, submitted applications prepared off premises on photocopied forms.

2. Those who applied in person

a. February–March 1994

Of those who submitted their applications in person at Salem's office, 10 appeared during February–March 1994. Six of these I already have named: Allen W. Craver, Allan T. Samuels, Don H. Craft, Paul D. Vogler, Gary M. Maurice, and Patrick D. Parsons. The other three applied as follows. Mack Good submitted his photocopied application (GC Exh. 82) at Salem's office on February 23. Part of it, apparently including the date of February 22, Good filled out the day before at the Union's hall. He submitted it to Gilchrist. (Tr. 5:656–657, 672–673); R. Exh. 33 at 3.) Thomas W. Hayes filled out his copy (GC Exh. 46) at the Union's hall and personally submitted it (along with copies of four others), apparently the same day, February 28, at Salem's office. (Tr. 2:288–290, 296–297; R. Exh. 33 at 7.) Completing his copy (GC Exh. 101) at the Union's hall, Steven G. Combs took it that day, March 7, to Salem's office where he delivered it (plus one other) to the receptionist. (Tr. 6:836–840; R. Exh. 33 at 8.) Larry T. Conrad delivered his March 13 application (GC Exh. 86), and several others, on March 14. (Tr. 5:687–691; R. Exh. 33 at 10.)

Under Salem's 60-day policy, the applications of these 10 individuals were active for 60 days. With the exception of

[8] Respecting Salem's trial summaries (which rely, in part, on the memories of Sink and Manuel, Tr. 9:1298, 1307, 1310, 1315, 1334, 1370–1371), I do not credit any of the entries, particularly the "reasons" or comments, that are inconsistent with my findings.

[9] I discuss later the missing August 1994 application of Russ P. Hawks.

Mack Good, all of the 10 applied for the employment position of "electrician" or "journeyman." Good wrote on his application that he was seeking "Any electrical work," and that his pay was "neg." (GC Exh. 82.) Most were looking for an hourly pay rate of $11 to $12, with one (Thomas Hayes) as low as $10. On his application, however, Hayes listed pay rates on his last jobs ranging from $15.79 to $19.69 per hour. (GC Exh. 46 at 2.)

As Vice President Sink (Tr. 9:1282–1283, 1292, 1348, 1352, 1407–1408; 10:1483–1485, 1491–1492, 1546–1548) and General Superintendent Manuel (Tr. 10:1582–1584, 1591–1592) credibly explained, Salem hires only for relevant vacancies. That is, journeymen (or mechanics; the terms are used interchangeably at Salem, Tr. 10:1496, Sink) are hired for journeymen positions, and apprentices or helpers are hired for apprentice positions. To classify an applicant, Salem looks at the person's actual experience and pay earned, not at the position and pay he states as desired.

The reason for not placing skilled persons at a lower level is simple. If a skilled person is hired at a level below his skill and pay experience, then he will be unhappy, unproductive, and will leave for a higher-paying position at the first opportunity. (Tr. 9:1283, 1292, 1352, 1407–1408, Sink; Tr. 10:1591, Manuel.) In this connection, Salem classified all 10 as journeymen. (R. Exh. 33.) So did the Union in its June 10 letter (GC Exh. 24) to Salem as to seven of the 10 (Craver, Craft, and Samuels are not listed). Craver's application (GC Exh. 90) shows a pay history of $12 to $14, and Croft's (GC Exh. 85) a history during the last 5 years, on referrals from the Union, at $12.30 per hour. In the spring of 1994, Salem's journeyman rate was $11.45 per hour. (Tr. 7:1051–1052; 9:1360; 10:1549, Sink.) Actually, Sink testified that Salem did not review the applications because it did not consider the applications valid. A formal listing of the classifications was not made until September 1994 when Sink began preparing a response to the unfair labor practice charge filed in the case. (Tr. 9:1345, 1349–1350.)

As Salem classified the 10 as journeymen, inquiry now turns to when Salem hired its next journeyman. The next journeyman hired was Davy W. Williams. He applied on April 2, 1994, and was hired (actually started work) on April 18. (R. Exh. 29; 9:1330.) Williams was referred by Salem employees, a foreman and a working foreman. (Tr. 9:1330–1331.)

(1) Allen W. Craver

Applying Salem's 60-day rule to the 10, we see that their applications became inactive between April 15 (Craver) to May 13 (Conrad). Although Salem on occasion goes beyond the 60 days, such as when the applicant has repeatedly checked on his application, particularly if he comes back in on the day Salem begins hiring again, the applicants here did not do that.

Salem could have considered Craver's application when it was considering that of Davy Williams, for Craver's was still active in the first half of April. The record is unclear whether it did so or not. Salem did not consider any of the "batched" applications because it did not view them as legitimate applications. But it is not clear that Salem initially included Craver's application with the ones that were batched, and it may not have done so until it prepared summaries in relation to the charges. Indeed, it was not until the August 2, 1994 amended charge in Case 11–CA–16141 that Craver was named as one of a group of 49 whom Salem had refused to hire since February 23. Craver is not one of those named in Business Manager Maurice's June 10 letter (GC Exh. 24) to Salem.

When Craver went to Salem's office on February 14 he did nothing to disclose his affiliation with the Union. For example, he made no mention of any Union affiliation on his application (GC Exh. 90.) The receptionist told him that Salem was not hiring. (Tr. 5:737.) Craver had worked for Salem previously, but the record is a bit unclear when he started and stopped. He mentions 1968 (Tr. 5:736), and states that he was laid off in 1988 (Tr. 5:743). He also states that he worked for Salem a "long time" (Tr. 5:744) at one location, that he was named in some unfair labor practice charges filed in 1987 (GC Exh. 92), and that he was involved in an active organizing campaign until he was laid off before an election that was held in 1987. (Tr. 5:744.)

The General Counsel announced (Tr. 5:746) that he would withhold offering a copy (GC Exh. 92) of the purported charge (Case 11–CA–12302, filed March 2, 1987, naming Craver and 44 others as having been discriminated against in some undisclosed way regarding their "hire and tenure"), until he could establish that the charge had been served. The General Counsel's expressed purpose was to show knowledge, by service of the earlier charge, of a link between Craver and the Union. (Tr. 5:741–742.) The General Counsel never thereafter offered anything further on the matter. [Although GC Exh. 92 was never offered or received, it mistakenly was included with the documents in the folder for the General Counsel's exhibits.] The General Counsel makes no argument that a presumption of service obtains from 29 CFR 102.14(b) (Regional Director "will, as a matter of courtesy, cause a copy of such charge to be served") plus the added presumption that government officials carry out the duties imposed on them by law. As the General Counsel neither offers the exhibit nor argues the evidentiary point, I need not decide whether the "courtesy" (under 29 CFR 101.4 and 102.14, service of a charge is the Charging Party's responsibility) is a duty imposed by law. Because of the references to General Counsel's Exhibit 92 in the record and here, and to avoid confusion, I now transfer that document to the rejected exhibits folder. I make no finding that Salem was ever served with a copy of General Counsel's Exhibit 92 or that it was aware of any link, about 1987, between Craver and the Union.

I find that the application of Allen W. Craver effectively expired on April 15, 1994. In short, there is nothing establishing a prima facie case respecting Craver's February 1994 application. There is no evidence showing that Salem should have considered Craver before it hired Davy W. Williams as a journeyman about April 18 (R. Exhs. 28, 29). In fact, Salem passed over four other journeymen applicants (whose applications contained no references to the Union) who personally applied between February 21 and March 21. (R. Exh. 36.) Two of the four Salem considered qualified, but Salem was not hiring at the time. (Tr. 9:1377–1379.) There being no prima facie case that Salem refused to consider Craver for hire, or that it refused to hire him, during the 60-day active period for his February 14 application, I shall dismiss complaint paragraph 15 as to Allen W. Craver respecting the alleged dates of "February 14, 1994, and mid-March 1994."

(2) Gary M. Maurice

Maurice's February 23 application (GC Exh. 3) was active for 60 days, to Sunday, April 24, or, using the next business day, Monday, April 25. As discussed above, about mid-April,

or no later than April 18, Salem hired, as a journeymen, Davy W. Williams. (R. Exh. 29.) On his application, Maurice stated that he would accept an hourly pay rate of $11—the same rate at which Williams was hired. (R. Exh. 28.) For his employment since 1988, Maurice listed his position at the Union, and his work as an electrician is shown as before 1988. (GC Exh. 3 at 2.)

Respecting the reason or reasons Salem did not hire Maurice, Sink testified that it was because Salem was not hiring when he came in. "That's the basic reason we didn't hire him." (Tr. 9:1351; R. Exh. 33 at 1.) This, apparently, ties to testimony, noted earlier, of Sink (Tr. 9:1282; 10:1544, 1564–1565), and Manuel (Tr. 10:1574–1575, 1591) that Salem interviews and hires from the most recent applications. Moreover, Salem passed over two qualified journeymen applicants, whose applications did not indicate they were affiliated with the Union, during this time frame because Salem was not hiring at the time. One of the two, Robert C. Burnette, had been referred by a Salem employee. (Tr. 9:1378–1379; R. Exh. 36.)

On brief (Br. 46), Salem notes that Maurice had been employed "as a Union business agent, as opposed to working as a journeyman electrician, since 1988." Salem cites *Zurn/N.E.P.C.O.*, 1995 NLRB Lexis 1057, "slip op. at 71–72 (claim of Union business agent dismissed since they had not worked the tools of the trade in five years)." But in Zurn the employer's witness testified to that effect. [JD(ATL)–56–95, Case 12–CA–15833, Nov. 2, 1995, slip op. at 67, pending before the Board on exceptions.] Here, that reason is not listed on Salem's trial summary (R. Exh. 33 at 1), and it is not given in the testimony of Sink. In fact, Sink's testimony apparently excludes any reason other than that Salem was not hiring when he applied (and Salem hires from the most recently filed applications).

As Salem was not hiring when Maurice applied, in view of Salem's policy of hiring from the most recent applications, and as Davy Williams' application was filed in April just a few days before he was hired, I find no prima facie case of unlawful discrimination, as alleged, against Maurice. Accordingly, I shall dismiss complaint paragraph 15 as to Gary M. Maurice.

(3) The remaining eight

(a) Introduction

The remaining eight (Craft, Samuels, Vogler, Parsons, Good, Hayes, Combs, and Conrad) identified themselves on their applications as affiliated with the Union, usually including the name of Gary Maurice as a reference. Salem "batched" the union-affiliated applications, and did not consider them as legitimate applications, because (R. Exh. 33) they did not complete an application on premises and because Salem was not hiring at the time. Additionally, as to three (Vogler, Parsons, and Hayes), Salem also asserts (R. Exh. 33) that they had an "unstable work history." Based on the findings I have made respecting Salem's waiver of the originals component of its rule number one, and the personal appearance of six of the eight with photocopies (two, Craft and Samuels, personally appeared and completed originals), I find that the eight satisfied Salem's (modified by waiver) rule number one.

By crediting Robin Gilchrist, I also have found that, shortly after Maurice left the stack of photocopied applications on February 23, General Superintendent Manuel told Gilchrist to keep the union applications separate and forward them to him. (Tr. 4:614–615, 618–619.) As I mentioned earlier, Sink testified that he directed Manuel to keep the applications brought in by the Union separated, or "batched." Sink did so because, as the applications were completed on photocopied forms, and as the applicants did not personally appear, the job seekers did not satisfy Salem's rule number one. Therefore, the documents were not legitimate applications. (Tr. 9:1292–1293, 1346, 1348–1349.)

Sink testified credibly on this matter, and I credit him. Notice that Sink's direction to Manuel pertained only to those applications which were: (1) on photocopied forms, (2) not presented in person, so that the applicant was not then available for personal interview. Until the trial, Sink, and apparently Manuel who worked with him on the trial summaries, thought that only two of the union applicants had personally applied on original forms. (Tr. 10:1481.) Although Sink did not name the two in his testimony, Salem's trial summary for 1994 shows them to be Gary Maurice (R. Exh. 33 at 1) and Russ P. Hawks, regarding his June 10 appearance (R. Exh. 33 at 13). (In relevant part, the trial summary simply states, as to Maurice and Hawks, that Salem was "Not hiring at the time," rather than the "Did not fill out application on premises" used for the others.")

In short, Sink's direction for Manuel to batch the (perceived) illegitimate applications was not based on union status, but on their status as failing to meet the components of Salem's rule number one. Although I have credited Gilchrist's recollection that Manuel told her to separate out all union applications, I find that such instruction was intended as a shorthand version for all the copies coming from the Union rather than a reflection of a design by Salem to assign all union-affiliated applications to the recycle bin. Thus, the important inquiry is what hiring was done during the "active" status of their applications. Turn now to that matter.

(b) Craft, Samuels, Vogler, Parsons, and Good

The active period of the applications of these five (Craft, Samuels, Vogler, Parsons, and Good) expired on or before Monday, April 25. That was after Davy Williams was hired but at least 1 day before Levern Quick applied on April 26. Quick was hired and started work, as a journeyman, on Monday, May 2. (R. Exh. 29.) Recall that Williams applied on April 2. None of the five came back around early to mid-April to check on his application. Thus, even without reaching Salem's reasons it would not have hired some of the five (such as an "unstable" work history),[10] I find that Salem's "most recent applications" policy eliminates these five from further consideration.

Moreover, during this same period Salem bypassed four nonunion (that is, no reference of union affiliation on their applications) journeymen applicants. Although Salem would not have hired two as having an unstable work history (Tr. 9:1378; R. Exh. 36), the other two (Tim Koroll, applied February 21, and Robert C. Burnett applied March 21) were both qualified, but they applied at the wrong time because Salem was not hir-

[10] Vice President Sink acknowledges that, in light of the nature of Salem's commercial customer base, an applicant from the construction industry is at an inherent disadvantage in applying at Salem because of the numerous job changes in construction. (Tr. 9:1354; 10:1467–1468.) Thus, Sink defines an "unstable" work history as one where the applicant has worked for three or four employers in the last year or two. (Tr. 9:1280, 1352, 1357; 10:1466.) While to some persons this definition and policy may not seem fair, Sink testified (Tr. 9:1352–1357), Salem is satisfied that its hiring policy has helped make it the dominant electrical contractor in Winston-Salem. (Tr. 9:1228; 10:1468–1469.)

ing. Burnette (not the Bobby L. Barnette named in the complaint) was even referred by a Salem employee. (Tr. 9:1378–1379; R. Exh. 36.)

In light of all the record, I find that the evidence fails to establish a prima facie case of unlawful discrimination, and I, therefore, will dismiss complaint paragraph 15 (regarding the spring of 1994) as to Don H. Craft, Mack Good, Patrick D. Parsons, Allan T. Samuels, and Paul D. Vogler.

(c) Thomas W. Hayes

On Monday, February 28, 1994, at the Union's hall, Thomas W. Hayes filled out (on a photocopied form, Tr. 1:138–139, Maurice) a Salem application. (Tr. 2:288–289.) That day he took his application (GC Exh. 46), and four others that had been completed, to Salem's office and submitted them to the receptionist, Robin Gilchrist. (Tr. 2:290.) Gilchrist did not comment about the references, on Hayes' application, to the Union. (Tr. 2:298.) Since that date, Hayes has not heard from Salem. (Tr. 2:292.) There is no evidence that Hayes ever contacted Salem, or went back to Salem's office, to check on the status of his application. Hayes' application reflects that he worked for four employers, at different times, between May 1992 and January 1994, apparently in the construction industry. On its trial summary (R. Exh. 33 at 7), Salem, aside from stating that Hayes did not fill out an application on the premises, asserts that it was "not hiring at time" and that Hayes, with his four jobs in less than 2 years, had an "unstable work history." Hayes' 60 days expired on Friday, April 29, 1994.

As already discussed, during this time frame Salem hired journeymen Davy Williams on April 18 (applied April 2) and Levern Quick on May 2 (applied April 26). (R. Exh. 29.) As discussed, Salem interviews and hires from its most recent applications. Under this policy, Hayes' application was near the bottom of the stack. Also, Salem similarly passed over qualified nonunion applicants Tim Koroll (applied February 21) and Robert C. Burnette (applied March 21), plus two others, deemed to have unstable work records, who applied in March. (R. Exh. 36.) Aside from the issue of an "unstable work history," the General Counsel offered no disparity evidence that Salem called either Koroll or Burnette to see whether either was still interested in working at Salem.

As the evidence fails to show, prima facie, any of the alleged unlawful discrimination, I shall dismiss complaint paragraph 15 as to Thomas W. Hayes.

(d) Combs and Conrad

As recited earlier, Steven G. Combs submitted his completed, photocopied application (GC Exh. 101) to Salem on March 7. He apparently did not thereafter check on his application. A former employee of Salem, Combs had worked for Salem about 6 to 8 months beginning in late 1986 and ending with his layoff in 1987. (Tr. 6:835.) Combs' 60 days expired on Friday, May 6.

Salem's trial summary reflects that Salem was not hiring at the time Combs applied. (R. Exh. 33 at 8.) As we already know, Williams applied on April 2, and began work on April 18. Levern Quick applied April 26, and began work May 2. (R. Exh. 29.) Mere announcement of union affiliation on an application, combined with a failure to hire (or even to consider for hire), does not establish a prima facie violation of the statute. *B E & K Construction Co*., 321 NLRB 561, 568 (1996). As nothing shows, prima facie, any alleged unlawful discrimination against Steven G. Combs, I shall dismiss complaint paragraph 15 as to him.

Larry T. Conrad had also worked for Salem, from October 1989 to March 1990. (Tr. 5:686–687, 717–718.) Conrad personally delivered his photocopied application (GC Exh. 86), with the applications of several others, on March 14. (Tr. 5:687–688, 691.) His 60 days expired on Friday, May 13. There is no evidence that Conrad returned during April to check on his March application. (He returned on March 22 to deliver applications of other union members. Tr. 5:708–711.) As Salem interviews and hires from its most recent applications, no reason is shown as to why Salem should have gone back and considered Conrad's March application before it hired Davy Williams on April 18 and Levern Quick on May 2.

As already noted, nonunion applicant Robert C. Burnette (applied in person on March 21; Tr. 9:1379; R. Exh. 36) was recommended by one of Salem's respected electricians. Burnette lost out because Salem was not hiring at the time. (Tr. 9:1379; R. Exh. 36.) The General Counsel did not offer evidence that, in April and May, Salem reached back and called (nonunion) Burnette to see whether he was still interested. As no discrimination has been shown, prima facie, I shall dismiss complaint paragraph 15 (March 14 and 22, 1994) as to Larry T. Conrad.

b. May 1994—Randy F. Penn

Randy F. Penn testified that he personally went to Salem's office on May 4, 1994. Obtaining a blank application from the receptionist, he completed it and submitted it (GC Exh. 72) to the receptionist. Penn has yet to hear from Salem. (Tr. 3:498–500.) Penn apparently never went back to check on his May 4 application. The photocopy in evidence (GC Exh. 72) has a heavy black smudge over the drug-testing portion—indicating that the original had that portion highlighted with some color. Penn's 60 days expired Tuesday, July 5 (the first business day after Sunday, July 3). Penn's first application (GC Exh. 7), on a photocopied form, was one of the batch which Business Manager Maurice delivered on February 23. On both documents, Penn wrote, in the activities section, that he does COMET organizing.

Salem's trial summary (R. Exh. 33) has no entry for Penn's May 4 application. [Neither does the Union's letter (GC Exh. 24) of June 10, but that apparently is because Maurice does not (Tr. 1:138), list Penn as among those he sent.] This absence appears to be due to the corresponding absence for that date, as to Penn, from complaint paragraph 15. Indeed, on brief Salem loftily announces that it is unnecessary to address the May 4 application because it is not alleged and therefore "may not be used to establish a violation of the Act." (Br. 54 fn. 23.)[11] While there using the lack of allegation as a shield, later Salem employs the May 4 application as a sword when arguing (Reply Br. at 4) the issue of highlighted applications. In short, Salem does not hesitate in seeking to exercise the "wanting-it-both-ways privilege."

But perhaps I am being too critical. After all, Penn's May 4 application (GC Exh. 72) is in evidence—because Salem never objected that there was no allegation to support it. Indeed, Salem lodged no objection to any of Penn's testimony about his visit of May 4. As a fully litigated matter, the May 4 applica-

[11] Salem does not contend (as it does concerning the August visit by Russ P. Hawks) that its records fail to show any such visit by Penn on May 4.

tion was tried by implied consent as a matter of law. Fed.R.Civ.P. 15(b). Salem's briefing would have been more helpful (and more commendable) had it conceded the obvious and addressed the merits of Penn's May 4 application. Turn now to the merits.

During Penn's 60-day period, Salem hired three journeymen electricians. (R. Exh. 29.) The first was Ron D. Bazzell on May 17 (applied May 16). Next was Ron E. Deaton on May 24 (applied May 23). Last was Reuben Blackney Jr. on June 6 (applied June 3). Recall that the "hire date" shown on the summary is actually the first day at work. In short, Bazzell and Deaton may have been hired the day they applied. The same could have been true as to Blackney [the spelling is per R. Exhs. 28 and 29 rather than the transcript] because June 3, 1994, was a Friday, and June 6 a Monday. Bazzell and Deaton, Sink testified, were former Salem employees with good work records, and Blackney was recommended by Leverne Quick, one of the new employees. (Tr. 9:1331–1332.)

During this same period Salem passed over Larry K. Brown, who applied on May 5, even though he had a good work record for the previous 8 years at Lilly Electric Co., because Salem did not then need a journeyman electrician. (Tr. 9:1379: R. Exh. 35.) William M. Sams, who applied on May 18, was not hired either, but he is recorded as having an "unstable work history." (R. Exh. 36.)

Sink was not asked to address Penn's May 4 application. The record, therefore, supplies no information on whether Salem did or did not consider his application, and why, when Bazzell, Deaton, and Blackney were considered and hired. Moreover, the General Counsel failed to show, as a type of disparity, that Salem called Larry Brown and asked him whether he was still interested, but failed to call Randy Penn. Instead, the evidence shows that Salem interviewed and hired as the need to do so arose, and did so as to Bazzell, Deaton, and Blackney because they happened to apply when they did—that is, they were at the "right place at the right time."

There being no evidence of unlawful discrimination as alleged, I shall dismiss complaint paragraph 15 (as amended by implied consent) as to May 4, 1994, for Randy F. Penn.

c. June 1994—Russ P. Hawks

Russ P. Hawks applied in person on June 10, 1994, and submitted copies for two other persons. Thus, his 60 days expired August 9. (Tr. 2:252–255, 270; GC Exh. 32; R. Exh. 33 at 13.) Hawks' chief problem is that Salem did not hire another journeyman until November 21 (R. Exh. 33 at 13; R. Exhs. 28, 29). During the interim, Salem passed over several qualified nonunion applicants who applied in July, August, and October, including two former Salem employees. (Tr. 9:1379–1380.) One (Thomas J. Bowman, applied July 14) of the former employees, who had a good work record at Salem, was referred by three Salem employees. However, Salem "Did not need [a] journeyman." (R. Exh. 36 at 2.) Indeed, Salem hired only eight journeymen during 1994 from and after February 15. (Tr. 9:1387; R. Exh. 29.) The General Counsel failed to show, as disparity, that Salem called one or more of the qualified nonunion applicants who were passed over in July and early August, because Salem was not hiring, and inquired whether they were still interested in coming to work at Salem.

As Salem's 60-day policy eliminated Hawks' June 10 application, I shall dismiss complaint paragraph 15, as to June 10, 1994, for Russ P. Hawks.

d. August 1994

(1) Paul D. Vogler—August 22, 1994

Although Paul D. Vogler completed the second of his applications, on a photocopied form (Tr. 5:808), at the Union's hall on August 18, 1994, he did not deliver it (GC Exh. 97), plus about three others, to Salem until Monday, August 22, 1994. (Tr. 5:794–796, 800–801; R. Exh. 33 at 15.) Vogler's application expired on Monday, October 17, 1994, 60 days after the date of his application.

As with the June application of Russ P. Hawks, Vogler's chief problem (aside from being labeled on Salem's trial summary as having an "unstable" work history) is that Salem was not then hiring journeymen. Salem did not do so until November 21 when it hired former Salem employee Eddie Carrazco who had applied November 15. (Tr. 9:1389–1390; R. Exh. 29.) Moreover, Rodney L. Haynes, a nonunion applicant rated as qualified, was not hired because Salem did not need any journeymen. Haynes applied on October 31. (Tr. 9:1380–1381; R. Exh. 36 at 2.) The General Counsel failed to show, as disparity, that Salem, before it hired Carrazco, called Haynes to see whether he was still interested in coming to work at Salem. Thus, Salem hires from its most recent applications, and this apparently means, for the most part, whoever has walked in the door within the last few days.

As Salem's 60-day policy eliminated Vogler's August 18, 1994 application, I shall dismiss complaint paragraph 15, regarding August 22, 1994, as to Paul D. Vogler.

(2) Russ P. Hawks—August 29, 1994

An additional controversy exists regarding the alleged visit of Russ P. Hawks on August 29—no one has a copy of his application. No August visit is listed for him on Salem's trial summary (R. Exh. 33), and the General Counsel relies (Br. 17 fn. 16) on Hawks' testimony that, on August 29, he obtained an original Salem application from the receptionist and submitted it, with copies for 11 other members (including Maurice's second application), to the receptionist. Hawks was not granted an interview that day. (Tr. 2:261–267, 272–274.)

Salem does not dispute that it has the copies (GC Exh. 35–45) for the 11. Thus, on its trial summary, Salem lists all 11 as having been received on August 29. (R. Exh. 33 at 16–19.) On cross-examination (Tr. 2:276), Hawks concedes that, in his pretrial affidavit of January 9, 1995 (R. Exh. 16), he states that he submitted his personal application, and only his application, "a couple of days before 8/29/94." Hawks asserts that the statement in his January 1995 affidavit is wrong, and that his trial testimony is correct, that he did it all on 1 day, not on 2 days. When he signed his affidavit, he believed it to be accurate, but he cannot explain how the error occurred. (Tr. 2:276–280.)

I need not resolve the dispute over whether Hawks in fact personally submitted a second application in late August, for even if he did, his application was eliminated 60 days' later. As with the August application of Paul D. Vogler, the General Counsel showed no disparity and no unlawful discrimination. Accordingly, I shall dismiss complaint paragraph 15, respecting the date of August 29, 1994, as to Russ P. Hawks.

(e) September 1994—Douglas Summers

At the Union's hall on September 12, Douglas Summers, who had worked for Salem about 3 months in early 1988 as a journeyman (Tr. 6:859; R. Exh. 33 at 20), filled out one of the

photocopied Salem application forms which Business Manager Maurice had supplied to Summers and several others. (Tr. 1:138; 2:210; 6:860.) Summers took his application (GC Exh. 103), plus the ones for two other members, with him the next day (Tuesday, September 13) to Salem's office where he gave them to the receptionist. (Tr. 6:860–865, 880–881, 886–887, 889–890.) Summers never heard from Salem. (Tr. 6:883.) The 60 days for Summers' application expired Friday, November 11, 1994.

On December 12 Salem hired journeyman James E. Scales who had applied November 15. (R. Exh. 29.) Sink credibly testified that Scales, while a Salem employee, had been injured in a motorcycle accident. Scales had been off work for several months when he reapplied (Nov. 15; R. Exh. 29) and Salem rehired him. (Tr. 9:1390.) Although Sink implies that Scales was hired when he applied ("we had a slot for him," Tr. 9:1390), Salem's trial summary of journeymen hired after February 14, 1994 (R. Exh. 29), shows that Scales' hire date (as we know, his first day at work) was December 12—nearly a month after he applied. Although Salem apparently has no medical leave of absence, it appears, as a practical matter, that Scales was given some preference for an anticipated vacancy (a retained "slot") rather than hired for an open "slot" when he applied. Assuming that Scales was given preferential treatment, such favored treatment was not based on union considerations.

Journeyman Edgar Griffin (applied December 16) was hired December 19. (R. Exh. 29.) Sink credibly testified that Griffin was a former Salem employee with a good work record. (Tr. 9:1391.) Nonunion journeyman Rodney Haynes (applied October 31) and Joey S. Hazelwood (applied December 20) both had good work records at their previous employers, but Salem did not hire either one because Salem "did not need a journeyman." (R. Exh. 36 at 2–3.) When Griffin was hired, there is no evidence that Salem called Rodney Haynes and asked whether he was still interested in coming to work for Salem. I need not reach Salem's note (R. Exh. 33 at 20) that Douglas Summers had an unstable work history.

As the evidence fails to show, prima facie, unlawful discrimination against him, I shall dismiss complaint paragraph 15 as to Douglas Summers.

f. May 1995—Kim A. Farley

(1) Facts

Kim A. Farley submitted three applications. His first application (GC Exh. 13), dated February 22, was in the stack of photocopies (original hand entries) tendered by Business Representative Maurice on February 23, 1994. (Tr. 1:64–66, 77.) His second (GC Exh. 93), dated September 17 was among the batched photocopies which Allan T. Samuels delivered on September 30, 1994. (Tr. 6:911–914.) As Farley did not personally appear at Salem's office respecting those first two applications, they were eliminated by Salem's personal appearance rule.

Finally, as Salem acknowledges (Tr. 9:1407; 10:1553), on May 8, 1995, Farley applied in person (Tr. 5:767–768) and completed a Salem application (R. Exh. 37) which he gave to the receptionist (Tr. 5:768). As I noted earlier concerning General Superintendent Manuel's business card (GC Exh. 94), the receptionist gave Farley one of Manuel's cards. (Tr. 5:768–772.) At 4 p.m. Farley called and spoke to Manuel. When Farley asked about his application, Manuel said he had it right there, but he had to check his crews to see how he stood and then he would get back to Farley. Manuel verified Farley's telephone number, and Farley, who said someone was always there, or the answering machine would record any message, then gave to Manuel the Union's telephone number, expressly stating that it was the Union's number. Manuel said he was writing it down and would be in touch. However, Farley credibly testified (Tr. 5:771), he never heard back from Salem.

Admitting to a telephone call from Farley, and that Farley had given him a telephone number which Manuel learned, supposedly much later, was the Union's, Manuel asserts that Farley called to ask whether there were any openings, and to announce that he was available for work. Salem had no openings at the time, Manuel told Farley, but Farley was "welcome to come by and put in an application." (Tr. 10:1596–1597.)

Although crediting Farley's version, I also credit some of Manuel's account, in the sense that Farley asked whether there were any openings, and also said he was available to work, and that Manuel said there were no openings. I do not credit Manuel's assertion that he invited Farley to submit an application, and that he did not learn until much later that the (additional) number which Farley gave him was the Union's number. Turn now to the staffing figures, keeping in mind that Farley's May 8 application was good through July 7, 1995, under Salem's 60-day rule.

During Farley's 60 days, Salem hired five journeymen (R. Exh. 38), and did not hire five qualified, nonunion applicants[12] because there were no vacancies for journeymen (R. Exh. 39). The five hired were Ronny F. Hash (applied April 27), hired May 15; Richard Powers (applied May 14), hired May 16: Stephen E. Necessary (applied May 17), hired May 22; Richard K. Fennell (applied March 7), hired June 13;[13] and Thomas A. Martin (applied June 26), hired June 30, 1995.

The five journeymen not hired were James R. Patterson (applied May 12), Joe E. Lilly (applied May 23), Stephen A. Randall (applied June 12), Gary W. Wyse (applied June 15), and Jesse D. Kennedy (applied June 16).

Ronny Hash, Sink credibly testified (Tr. 9:1396, 1399–1400, 1404–1405), was hired May 15 for the position of residential specialist rather than as a general journeyman. Nothing indicates that Salem should have considered Farley for this position.

A different story is presented by the hiring of Richard Powers (May 16), Stephen E. Necessary (May 22), and especially Richard K. Fennell (applied March 7, hired June 13). Recall that on May 8 Farley telephoned General Superintendent Manuel to discuss his application. Recall further that, as in Fennell's case, such interest is seen as a positive sign. Sink rates Powers, Necessary, and former Salem employee Fennell as well qualified. Farley's application (R. Exh. 37) openly shows affiliation with the Union, and he gave Manuel the Union's telephone number, expressly telling Manuel that it was the Union's. Manuel said he would call Farley, but failed to do so. In these circumstances, it appears that Salem was obligated to consider Farley's application (or risk a finding of prima facie unlawfulness for failing to consider).

Salem did consider Farley's application. Nothing required Manuel to call Farley and give him the bad news. And, with

[12] Their applications, as Sink recalls (Tr. 9:1412), contained no indication of union affiliation or support.

[13] Earlier I discussed Salem's beyond 60 days' hiring of Fennell as a possible error in Salem's application of its policies.

lawsuits unlimited by anything, unless the news can be good, any response other than a terse written "thank you for applying" risks litigation. The bad news was this, as described at trial by Sink. First, Farley was unacceptable because of his "unstable" work history—four jobs in the last 1-1/2 years. Recall that Sink defines an "unstable' work history as one where the applicant has worked for three or four employers in the last year or two. (Tr. 9:1280, 1352, 1357; 10:1466.) Thus (Tr. 9:1407, Sink):

> Well, to me that's an unstable work history. That guy to me jumps around a lot.[14] I mean within a year—a little over a year, a year and a half he worked for four companies, two of which he only worked for one month. That's not the kind of people we put to work.

Second, Farley's pay at each of his last four employers was $18 per hour. (R. Exh. 37 at 2; Tr. 9:1407.) As Sink testified (Tr. 9:1407):

> Not only that reason [unstable work history], if you look over to his salary desired ["Neg" on his application, R. Exh. 37 at 1, apparently meaning negotiable], he came from a place making $18.00. As a matter of fact his last four employments were $18.00 an hour. In May 1995 our journeyman's pay was $12 an hour. As I stated earlier [Tr. 9:1283, 1352], we don't hire those kind of people.
>
> If we tried to put him to work at $6.00 an hour less than what he has been making, he's not going to be a happy, productive worker. [Tr. 9:1283, 1292, 1352.] I know that. I mean it just won't work out. So those are the reasons that I didn't hire him versus the reasons that I hired these guys.

Attacking Salem's "unstable" ground as a sham, the General Counsel cites (Br. 81–82) Salem's hiring of Edward Shoemaker (February 3, 1995), Ronald D. Sutphin (July 7, 1995), John Reece Jr. (June 2, 1994), and Milton Garwood Jr. (October 13, 1994).

Earlier, under the topic of Salem's 60-day rule, I discussed Garwood's hiring and that he admittedly (Tr. 10:1508–1509, 1513, Sink; R. Exh. 35 at 4) had a poor work record and an "unstable" work history. Nevertheless, Salem hired Garwood, a former Salem employee (Tr. 10:1513; R. Exh. 32 at 7), as a "top helper" apprentice. (Tr. 10:1511, 1549; R. Exh. 32 at 7; GC Exh. 133.) Hardpressed to explain Garwood's hiring, Sink simply "assumes" that Garwood, by his persistence in checking on his application, including a visit on October 11 (R. Exh. 32 at 11), walked in at the right time. (Tr. 10:1511–1513.)

In response to the General Counsel's attack, Salem (Reply at 7) observes that Garwood was a former Salem employee. That apparently is true, but it did not keep Salem from rejecting his undated (March 1994 per R. Exh. 35 at 4) application (GC Exh. 132) on the grounds, (1) a "poor work record [apparently when a former Salem employee], (2) two gaps in his employment history since January 1991, and (3) an "unstable work history" of four stated employers since January 1991. (Tr. 10:1508–1509; R. Exh. 35 at 4.) We are left with Sink's inference from the data that Garwood was hired because Salem needed an apprentice at the moment Garwood walked in, or at least within a few hours of his visit. As implied by my earlier discussion, with many more Garwood examples, Salem can kiss goodbye to its hiring rules.

John Reece Jr. (also prominent in a separate complaint allegation about a strike, as I discuss later) applied (GC Exh. 111) on June 1, 1994, with former employee Jeffrey A. Wyatt. (Tr. 6:1000–1001.) This was either the day after (R. Exh. 32 at 3), or the same day (R. Exh. 32 at 3; Tr. 9:1281–1282; 10:1493), Weyerhauser had called Salem to send two apprentice electricians. At the "right place at the right time," Sink testified (Tr. 9:1281–1282; 10:1491, 1547), Reece and Wyatt were hired as top helpers and, after their drug test, sent the very next day to Salem's Weyerhauser job. (Tr. 6:957, 970, 1004; 9:1281–1282; R. Exh. 28 at 2; R. Exh. 32 at 3.)

Manuel testified that Salem's superintendent at Weyerhauser had called him that morning to report that he needed two helpers immediately. That same afternoon Wyatt and Reece came in and applied. Manuel first interviewed former Salem employee Wyatt, and hired him as a top helper apprentice. Wyatt said that his friend (Reece) needed a job bad, that (as Wyatt confirms, Tr. 6:972) they rode together because Reece did not have a driver's license. (Tr. 10:1578.) Manuel interviewed Reece and, as Wyatt and Reece rode together and because Manuel felt sorry that Reece was unemployed, Manuel also hired Reece as a top helper. (Tr. 10:1578; R. Exh. 28 at 2; R. Exh. 32 at 3.)

All this is background to the observation that Reece's application (GC Exh. 111 at 2) reflects that he had worked for four employers during the previous 18 to 19 months. When questioned about this on cross-examination, Sink (Tr. 10:1491) agreed that it showed "job hopping," but "Mr. Reece was in the right place at the right time. I believe I testified [Tr. 9:1281] to that yesterday." Although neither party specifically asked Manuel about Reece's "job hopping," Manuel testified that he "walked through the application" with Reece. (Tr. 10:1579.) I find that Manuel decided that the "job hopping," at least as to Reece, would have to yield to Salem's need to send two helpers to the Weyerhauser job. Manuel was not asked whether he considered calling someone else from applications on file in his desk. At the time, Wyatt (Tr. 6:951) was not a member of the Union, and there is no evidence that Reece was. Maurice testified (Tr. 1:149) that the two joined the Union before October 4, 1994,—the date Wyatt and Reece began an alleged economic strike against Salem.

Michael E. Shoemaker applied as a "walk in" (GC Exh. 125; 10:1469, Sink) on February 2, 1995. He was seeking, per his application, an electrician's position ("Elt" on his application, GC Exh. 125) at $12 per hour. Shoemaker was hired and put to work the very next day, February 3, as an apprentice at $11.25 per hour. (GC Exh. 125; R. Exh. 30 at 1; 10:1545, Sink.) Shoemaker's list of employers gives names, but no addresses, and dates for only the last three—three employers since July 1994 (about 6 months). When he applied at Salem, Shoemaker was in temporary layoff status from his then, or last, employer. (GC Exh. 125 at 2.) Sink concedes that he would not consider Shoemaker's application to be "well completed" for Salem's purposes. (Tr. 10:1470.) Nevertheless, Salem hired Shoemaker and put him to work immediately after a drug screening. (Tr. 10:1544–1545.) Although Sink was not specifically asked, Shoemaker's three employers in the span of some 6 months clearly meets Sink's own definition of "unstable." I so find.

Ronald D. Sutphin applied for a $10-per-hour top helper's position on June 26, 1995 (GC Exh. 126), and on July 7 he was

[14] As Sink testified earlier (Tr. 9:1283): "A guy that jumps around a lot, we don't hire those kind of people."

hired as such for $10.20 per hour. (GC Exh. 126; R. Exh. 30 at 4; 10:1474.) Although Sutphin lists his address as Austinville, Virginia (GC Exh. 126), and Salem prefers to hire from the local area (Tr. 7:1182, 1190; 9:1228; 10:1472, 1537), which Sink defines (Tr. 10:1537) as being within a 25-mile radius of Winston-Salem, and even though Sink does not know where Austinville is, but assumes it is not local to Winston-Salem (Tr. 10:1472),[15] and does not know any of the references given by Sutphin (Tr. 10:1474), and notwithstanding that Sutphin's list of previous employers shows huge gaps in employment (accounting for only 12 months out of the last 4 years 3 months: (GC Exh. 126 at 2; 10:1474), Salem still hired Sutphin.

As for hiring Sutphin, Sink cited no special need, and the 11 days between his application and hire dates demonstrates that Sutphin did not simply walk in on the very day Salem needed to hire a top helper. On redirect examination, Sink testified that, as best he recalls, Sutphin had worked for Salem about the mid-1980s. (Tr. 10:1545–1546.) [That bit of testimony would have been a lot more impressive coming during the direct examination, where it should have been adduced.]

Turn now to the ground of wage disparity which Sink listed as the second reason Salem did not hire Kim Farley. Recall that the disparity, as to Farley, was $6 per hour ($18 with all four previous employers compared to Salem's $12 journeyman rate). "As I stated earlier [Tr. 9:1283, 1352], we don't hire those kind of people. If we tried to put him to work at $6.00 an hour less than what he has been making, he's not going to be a happy, productive worker. I know that. I mean it just won't work out." (Tr. 9:1407–1408, Sink.)

Oh, but yes Salem does hire them, the General Counsel argues (Br. at 84), citing the hires of John Reece Jr., Stephen Necessary, and Evan VanHorn—none of whom listed any union affiliation on his application. Reece, who applied on June 1, 1994, was hired as an apprentice either that afternoon or the next morning when he began work. (GC Exh. 111; R. Exh. 28 at 2; R. Exh. 32 at 3.) Reece did not specify a desired wage rate on his application, although he did state that he was applying for the position of "electrician."

As noted earlier, Sink testified that the requested position and desired salary do not govern Salem's evaluation. Instead, Salem analyzes the applicant's pay history and fixes the hire classification and pay rate based on Salem's own analysis. Thus, even though applicants may request a journeyman position and salary, when their work and pay history disclose that, instead, they have been apprentices, Salem classifies them as such and pays them accordingly. (Tr. 9:1292, 1342, 1348; 10:1482–1485, 1547–1548.) Recall Sink's testimony that, during this part of 1994, Salem paid its journeymen $11.45 per hour and top helpers $10.30. (Tr. 7:1051–1052; 9:1360; 10:1549.) [Salem's summary indicates that such rates prevailed to the end of 1994. R. Exh. 28. The summary for employees hired in 1995 indicates that Salem increased the (general) journeyman pay rate to $12, with top helpers hired at $11.25 to $11.50 and even, for one person hired on August 30, $11.75. R. Exh. 30.]

Reece's previous pay rates, as shown on his June 1, 1994 application (GC Exh. 111 at 2) beginning with his most recent of four employers, were $11.25, $12.50, $8.50, and $13.75, for an average of $11.50—almost exactly Salem's pay rate for its journeymen. However, as I have discussed, Manuel hired Reece and former Salem employee Wyatt as top helpers at $10.30 for the Weyerhauser project where Salem needed two apprentices (a classification which includes top helper, Tr. 7:1046; 10:1549, Sink). That Manuel possibly shortchanged Reece appears more related to Manuel's desire to fit Reece into the apprentice mold with Wyatt so Reece could be hired with Wyatt and both be assigned to the Weyerhauser job, and less related to any idea of classifying a journeyman as an apprentice so as not to open Salem up to a charge that it should have hired one of the Union's journeymen. In any event, the pay disparity between what Reece had been earning ($11.25 on his last job), and the top helper pay of $10.30, is not great. The matter is debatable, but clearly there is not a $4 or $5 per hour difference. Reece's situation, I find, does not undermine Salem's wage disparity ground.

Now consider Stephen Necessary. His last four listed employers were paying him (GC Exh. 108 at 2): $19 [possibly $19.04; the writing is not clear], $17.50, $18, and $17. As these jobs go back to 1978, the last one (1992 to the May 17, 1995 application date) and penultimate (1991 to 1992) should suffice. Those two average $18.25—obviously a large disparity from his $12 journeyman rate (GC Exh. 108; R. Exh. 30 at 3) at Salem.

At his 1989–1991 employer, Carolina Instrumentation Company, or CIC, Necessary worked "at the management level" as an estimator and shop supervisor. CIC, a "sister" or affiliated company with Salem that at the time was in the same building as Salem, and Necessary knew Sink and Manuel (Tr. 6:943–944)—a fact which Sink confirms (Tr. 9:1405). In October 1994, Necessary suffered a stroke, and, after a rehabilitation period, he needed reduced working hours from the 12-hour workday at his employer in Reidsville, North Carolina, an hour's one-way commute from his home in Winston-Salem. (Tr. 6:941.)

When he applied at Salem, Necessary had not been working. He was without money and needed a (new) job. During his interviews with Sink and Manuel on May 17, when he was hired, Necessary told them of his situation and medical condition. Nevertheless, Salem hired him. Necessary was assigned to work at Lake Forest University. (Tr. 6:938–939, 941, 944.) One day is all that Necessary could work, however, because his work assignment included operating a hammer drill overhead. The work was "very stressful and very strenuous," and Necessary was off work the rest of the week. The following Monday he told Sink that, while he did not want to do so, he would have to resign for health reasons. Sink said that Salem already had hired a replacement. (Tr. 6:940–942.) [If Sink "hired" a replacement, rather than transferring someone, then the new hire was one of the seven first or second year apprentices hired from May 23 through 25, or possibly the $10.80 apprentice hired on May 25, because the next journeyman hired was Richard Fennell, and Fennell was not put on the payroll until June 13. R. Exh. 30 at 3, 4; R. Exh. 38.]

On his application (which does not reflect affiliation with any union), Necessary applied for work as an electrician, estimator, or program manager, and stated that he would work for whatever rate was negotiated. Sink asserts that, feeling sorry for Necessary because of his medical problem and no income, and knowing of Necessary's excellent skills, he hired Necessary as a journeyman with the idea that eventually Necessary could move into Salem's managerial ranks. (Tr. 9:1405–1406.)

[15] An atlas shows Austinville, Virginia to be about 70 miles northwest of Winston-Salem, just west of IH 77.

The General Counsel (Br. at 37) subtly suggests doubt about any compassion by Sink in hiring Necessary in view of Necessary's assignment to operate a hammer drill overhead. At trial the parties did not explore this matter, and did not show for example, how long such work was to last and whether there were any alternatives. As such work apparently is, or can be, part of a journeyman's job, I draw no inferences respecting that work assignment.

[If Sink hired an apprentice to replace Necessary, that (assumed) fact could lend support to Sink's stated purpose in hiring Necessary. That is, even if Salem actually needed only an apprentice on the university job (a matter of speculation), Sink still wanted to hire Necessary for two reasons. One reason was Necessary's future managerial prospects. The second was Sink's compassion for Necessary's situation. With Necessary off the job, whether temporarily or permanently, Sink simply hired all the job really needed—a helper. I sketch this possible explanation, with no finding, only because of Necessary's testimony that Sink said he had hired a replacement.]

I find that Necessary's hiring is inapposite as to the type of disparity which tends to disclose an unlawful motivation respecting Union adherents not hired. To show that, the evidence should have some examples of disparity uncomplicated by circumstances suggesting, as here, Good Samaritan motivations. Turn now to Evan VanHorn.

Evan D. VanHorn applied April 21, 1995, and was hired April 24 as a journeyman at $12. (GC Exh. 119 at 2; R. Exh. 31; R. Exh. 30 at 2; Tr. 9:1285–1286, Sink.) The evidence as to VanHorn does not support the General Counsel's position. Although VanHorn's application shows, in the work history section, that he earned $21 an hour from January 1984 to January 1991 working on referrals from IBEW Locals 553, Raleigh, North Carolina, and 342 of Winston-Salem, for the last 4 years (January 1991 to April 1995) he had been working for Pike Electric in Mt. Airy, North Carolina for $12.25. The 4 years with Pike Electric impressed Sink (Tr. 9:1285), and VanHorn's pay at Pike Electric was almost identical to Salem's $12. [VanHorn, who lives in North Wilkesboro, North Carolina, was tired of too much driving time commuting to and from Pike Electric. The distance is about the same to Winston-Salem, but apparently the driving arrangement at Pike was, per his application, "very unorganized." (R. Exh. 31 at 2).]

On his application, VanHorn wrote that he stopped taking union referrals because he "wanted to see my daughter grow up." The General Counsel's suggestion that this somehow means VanHorn had "renounced" (Br. 84) his IBEW membership is without foundation in the record. Moreover, if Salem really is opposed to anyone having the "taint" of union association, it would seem that Salem would never have hired VanHorn. ["Salem's success in keeping its work force untainted by the presence of union affiliated workers is unparalleled." (GC Br. 84).]

Having opened the subject of union-affiliated hires by Salem, I further note that VanHorn is not the only such person hired. In a scene prefiguring Maurice's action of February 23, 1994, when union member Timothy W. King applied on June 5, 1992 (R. Exh. 2), he attached Business Manager Gary Maurice's business card to his application. (Tr. 3:435, King.) Manuel not only called him back for an interview that same day (a Friday), but hired him (with Maurice's business card right there with the application) and put him to work on Monday, June 8, 1992. (R. Exh. 2:3:436–437, King; Tr. 9:1284, Sink; Tr. 10:1604, Manuel.) King left about a month later, of his own accord, to take a job outside the state. (Tr. 3:431.) One of the applications which Maurice delivered on February 23, 1994, was that (GC Exh. 19) of King (Tr. 1:65; 3:431). Unlike in 1992 when he went to Salem's office in person, however, in 1994 King did not go to Salem's office. (Tr. 3:433.)

Although the General Counsel considers King's 1992 hiring as "irrelevant" because of the lapse of some 2 years (Br. at 21 fn. 20 and 56 fn. 65), I see it as quite relevant. Indeed, if Salem has such "unparalleled" success at keeping its work force "untainted by the presence of union affiliated workers," why would Salem have hired a man who so boldly—even confrontationally—attached Maurice's business card to his application? If a leopard in 1994, did Salem have no spots in 1992?

Salem also hired Tom Nicholson. In a conversation with Nicholson after Salem had hired him, Sink learned that Nicholson had been affiliated with a union in New York. Nicholson has since been promoted, and he now is one of Salem's job superintendents. (Tr. 9:1286–1288, Sink.) Nicholson testified that in earlier years he had been a member of the "electrical trade" in Jew York and New Jersey. (Tr. 10:1643.) He came to work for Salem in 1994 as a foreman, and he now is a job superintendent. (Tr. 10:1644–1646.) Nicholson's case of a promotion to job superintendent only remotely bears on our case. However, the fact of Nicholson's promotion, in light of his prior association with a union, at least shows that Salem is not spooked by the thought that one of its superintendents has had a past association with a union.

(2) Discussion

The first question, and maybe the last, is whether, from all these facts, a finding should be made that the evidence shows, prima facie, an unlawful refusal to hire Kim A. Farley. Earlier I found that Salem did consider Farley's May 8, 1995 application.

As I have summarized, the three journeyman hired by Salem whom I find to be relevant, for comparison purposes, are Richard Powers (applied May 14, 1995, hired May 16), Richard K. Fennell (applied March 7, 1995, hired June 13), and Thomas A. Martin (applied June 26, 1995, hired June 30). I exclude the May 15, 1995 hiring of Ronny Hash (as a residential specialist) (nothing indicates that Farley would have been in competition for residential specialist), and Stephen Necessary (hired May 22, 1995) (apparently for considerations other than the needs of the specific job) as too marginal in relevance.

What evidence there is as to Powers, Fennell, and Martin was supplied by Sink. From Sink we learn (Tr. 9:1405) that Powers was considered a "known commodity" (a factor favored by Salem; Tr. 9:1281; 10:1462, Sink) because he previously had worked for Salem on "loan" from Pinnacle Electric and had made a good impression while at Salem. Moreover, Powers' work record at his previous employers was good, and he was recommended by a Salem employee. (Tr. 9:1405; R. Exh. 38.) No copy of Powers' application is in evidence. The wage rate he requested was, Sink testified (Tr. 9:1407), in line with that of Salem. Nothing establishes, prima facie, that Salem should have hired Farley rather than Richard Powers.

Then we have the June 13, 1995 hiring of Richard K. Fennell—even though he had applied way back on March 7. Although he had applied 98 days' earlier, Salem considered him because of his checking back several times, including in person and by telephone, with the latest being "in June." (Tr. 9:1279, 1400, 1404, Sink.) Fennell had the benefit of 6 years'

service with Salem, and Salem favors hiring former Salem employees with good work records. (Tr. 7:1193; 9:1279, 1400, 1404.) Even if we were to say, as to the checking back, that Farley is on a par with Fennell because Farley called Manuel, who said he would call Farley back (but did not), we still are faced with the preference which Salem grants former Salem employees. Unlike some others who had been former Salem employees for a few weeks or months, Fennell had been with Salem for 6 years.

Recall that Sink and Manuel begin their interview search by looking at the most recently filed applications. That apparently does not help Farley here because Fennell's latest check back had been "in June," Sink testified. (Tr. 9:1279.) Thus, the Government is unable to point to anything which gets Farley's case over the prima facie hump as to the vacancy filled by Richard Fennell.

Thomas A. Martin, hired June 30, 1995, filled the last journeyman vacancy that arose during Farley's 60 days. [The next journeyman was not hired until August 21, 1995. R. Exh. 30 at 4.] Former Salem employee Martin, Sink testified (Tr. 9:1406–1407), had a good record at Salem, a stable work history elsewhere, and was asking for a rate in line with that paid by Salem. (Tr. 9:1395–1396, 1406–1407.) Nothing indicates that Salem shoud have disregarded its preference for former Salem employees in order to hire Kim Farley rather than Thomas A. Martin.

In light of the foregoing, I conclude that the Government has failed to establish, prima facie, that a moving cause for Salem's refusal to hire Kim A. Farley, within 60 days of his May 8, 1995 application, was Farley's identification as an active member of the Union. Accordingly, respecting May 8, 1995, I shall dismiss complaint paragraph 15 as to Kim A. Farley.

3. Those who did not apply in person

Having dismissed complaint 15 as to all those who applied in person, and concluding that no prima facie violation has been shown respecting their cases, I now address those who did not apply in person. Earlier I found that Salem's in-person requirement remained valid. Because of that valid requirement, it follows that complaint paragraph 15 must be dismissed as to all those who did not apply in person. As that means the balance of the applicants named in the paragraph, I now shall dismiss complaint paragraph 15 in its entirety.

F. Strikers Jeffrey Wyatt and John Reece Jr.

1. Introduction

As amended, complaint paragraph 21 alleges that, since about May 10, 1995, Salem "has failed and refused to reinstate Jeffrey Wyatt and John Reece, Jr. to their former or substantially equivalent positions." Salem admits they have not been reinstated, and advances two affirmative defenses, the first being that they would not have been reinstated in any event, and the second being the bar of limitations. This allegation concerns an economic strike by Wyatt and Reece beginning October 4, 1994, and ending December 21, 1994 (the dates were amended at Tr. 7:1042–1043), with the Union's letter unconditionally offering their return to work. Salem replied that they had been permanently replaced. Despite Salem's reply, and a contemporary understanding by Wyatt and Reece, and by inference Business Manager Maurice, that Salem had been, and was, hiring in late 1994 and early 1995 (which it was), the charge (Case 11–CA–16696) was not filed and served until October 27, 1995. During NLRB Region 11's investigation of that charge, Maurice wrote the Region that the Union's first knowledge [actual knowledge, presumably] of any hiring by Salem was not until about May 10, 1995, when Salem hired Sean Gallagher. Maurice did not testify to this effect (his letter was not offered or received for the truth), and Gallagher did not testify. On brief Salem, in addition to arguing the merits, relies on its limitations defense. However, the Government does not address the limitations question, apparently conceding the issue, and the allegation.

2. Facts

As earlier discussed, on June 1, 1994, Jeffrey A. Wyatt (GC Exh. 109) and John Reece Jr. (GC Exh. 111) applied at Salem's office for work as electricians. Although they were not then members of the Union, they apparently knew Business Manager Maurice, for it was Maurice who suggested (Tr. 1:104–105) that they apply in person at Salem. They did, were hired, passed their drug screens, and began work June 2, 1994, as top helpers at $10.30 per hour. (R. Exh. 28 at 2; R. Exh. 32 at 3; GC Exh. 109, 111.)

On his application (GC Exh. 109), Wyatt wrote that his desired pay rate was negotiable ("Neg."). In the list of former employers, Wyatt wrote that he had worked for Salem twice, the first time from May 1986 to August 1987, and again from June 1988 to August 1988. At Salem Wyatt had started at $6.30 and worked up to a top helper at the then rate of $8.90 before being laid off. For his last 2 years, June 1992 to May 1994, Wyatt recorded that he had worked for Lilly Electric at $8.35 as an "electrician" before being laid off. Recall that in May–June 1994 Salem's journeyman rate was $11.45 (Tr. 7:1051–1052; 9:1360; 10:1549, Sink), and that, as I summarized under the Kim Farley allegation, in fixing a hiring rate Salem is guided by the applicant's recent pay history, not his desired rate. In this connection, Sink testified that nothing on Wyatt's application indicated journeyman status, and that his pay history demonstrated the apprentice range. (Tr. 10:1548–1549.)

According to Wyatt, Manuel told him that after 90 days he would be evaluated to determine whether he should be promoted to mechanic (journeyman) at $11.45. (Tr. 6:958.) Reece testified that Manuel told him essentially the same. (Tr. 6:1004.) On his first day at work, on the Weyerhauser job, Randall King, the job foreman, assertedly told Wyatt that Manuel had said he was sending him two mechanics to do certain work. Wyatt told King that Manuel was a liar for he had hired Wyatt and Reece as helpers. (Tr. 6:991.) Both then and later Wyatt complained to job foremen that he was doing the work of a mechanic but being paid a helper's rate.

Some 4 to 5 weeks into their employment with Salem, Wyatt and Reece were transferred to the North Carolina Baptist Hospital project in Winston-Salem. (Tr. 6:958, 1004.) Robert Satterfield was the job superintendent there. (Tr. 6:958, 1005; 10:1652–1653.) The last 2 months or so that Wyatt and Reece were on that job, Tom Nicholson apparently was the general foreman on the job. (Tr. 10:1645–1646.)

Almost from the beginning of their employment Wyatt and Reece complained to their job foremen that they were doing mechanic's work for helper's pay. About late August, while they were on the hospital job, they began complaining to Robert Satterfield, the job superintendent, saying they should be paid more, and asking him to speak to General Superintendent Manuel. (Tr. 6:964, 970–971, 1006.) Satterfield said he would and would get back to them. Satterfield never did.

About 4 p.m. (Tr. 6:1009; 10:1580) on Tuesday, October 4, 1994, Wyatt (Tr. 6:962) and Reece (Tr. 6:1007–1008) testified, they went to see General Superintendent Manuel. [Reece testified that they first stopped to see Satterfield, and when he gave them the same answer as before, they told him they would go speak to Manuel themselves.] There is no dispute that the two visited with Manuel in the latter's office that late afternoon. In fact, Wyatt secretly tape recorded the conversation, and a transcript (GC Exh. 110) of the 20- to 30-minute conversation is in evidence. There is a dispute concerning whether Reece said something which is not on the transcript, and a dispute whether Wyatt and Reece worked on October 4 (with Salem arguing that they did not). The relevance of the first dispute apparently bears on the concerted nature of the strike. (This is a moot point. Salem does not argue that the strike was not concerted.) The relevance of the second disputed item bears on the question whether Satterfield had decided to fire Wyatt and Reece because of attendance problems when they missed work, again, that Monday, October 3.

I devote little time to the attendance/termination matter because, even though I credit Salem's evidence[16] that Wyatt and Reece both missed work on Friday September 30 and Tuesday, October 4, and Satterfield's testimony that he made the decision that Tuesday morning to terminate the two for absenteeism (Tr. 10:1658–1663), the decision was never finalized by Salem. Satterfield did not fill out the paperwork (R. Exhs. 44 and 46) until Wednesday, October 5, and the paperwork consists of nothing but written warnings to Wyatt (R. Exh. 46) and Reece (R. Exh. 44) for absenteeism. Granted, under Salem's disciplinary policy (GC Exh. 140), an employee "may" be terminated for a third offense (GC Exh. 140), and even though it was the third offense here, Satterfield only recommends (Tr. 10:1688). Here, Sink had not signed his required approval (Tr. 10:1688) of the warnings, apparently because Wyatt and Reece already were gone. (Tr. 10:1690.) Thus, no action was taken by Salem on the third offense warnings issued by Satterfield. As the "may" terminate is discretionary, presumably Sink, were he so inclined, could have temporarily suspended Wyatt and Reece, he could have reassigned them to some other project, or he could have fired them. He can make that decision if and when Salem is ordered to reinstate them. Turn now to the late afternoon meeting with General Superintendent Manuel on October 4, 1994.

The 13-page transcript of the late afternoon conversation with Manuel appears to be relevant for only two reasons. First, it shows that the nature of the rambling conversation related primarily to wage rates and job duties (or, more accurately, job classifications) as complained about by Wyatt and Reece. (Wyatt did most of the talking of the two, and it is implied that he is speaking for both.) Indeed, Wyatt not only spoke of a pay raise, but said that back wages should be paid for the last 3 months of doing mechanic's work. (GC Exh. 110 at 12.) [At one point, Wyatt stated that either Manuel or Randall King was a liar concerning the job classification under which Wyatt and Reece had been sent to the Weyerhaeuser job. (GC Exh. 110 at 7.)]

Second, the transcript bears on the concerted nature of the strike. That is, the transcript ends with Manuel [who earlier, at pages 1 and 12, had promised to investigate, do an evaluation, and render an answer in 2 days] responding, to the claim for back wages, that he did not hire Wyatt [and Reece] as a mechanic, so "you ain't going to see no back wages." "Okay," Wyatt states, "I'm going on strike." Manuel replies, with the last entry, "But I'll, give you a call Thursday." (GC Exh. 110 at 13.)

According to Wyatt, Reece also said he was going on strike (Tr. 6:965, 967), but because Wyatt had turned and was walking out as Reece spoke and as Reece has a soft voice, the recorder did not pick up what Reece said (Tr. 6:979–983). Reece asserts that he did add, after Wyatt, that he also was going on strike, but that Wyatt had already stepped out the door to Manuel's office. (Tr. 6:1010–1011.) Reece made his strike statement just once. (Tr. 6:1023–1024, 1026–1027, 1032.) Manuel recalls that Wyatt said, "We're on strike." (Tr. 10:1581, 1585.) As the transcript shows, Wyatt did not say "We." I find, however, that Manuel heard both Wyatt and Reece say that he was going on strike, and that Manuel, quite naturally, converted both statements into a plural. In short, the strike was concerted—and would be even without the "We," because of the nature of the meeting.

Some 2 to 3 days before the October 4 meeting with Manuel, Wyatt, and Reece, thinking about quitting their employment at Salem over the pay and work problems, had gone to Maurice and joined the Union. Maurice suggested that they also had the option of going on an economic strike. (Tr. 1:149; 2:235–238; 6:973–974, 1021–1022.) After Wyatt and Reece struck, Maurice found them work in West Virginia. After a couple of months, Wyatt and Reece were ready to return to Winston-Salem, so Maurice sent a December 21, 1994 letter (GC Exh. 27) notifying Salem that Wyatt and Reece were ending their economic strike and unconditionally offering them back to work. Responding with its letter (GC Exh. 28) of December 23, Salem (by President Myers) advised that Wyatt and Reece had been "permanently replaced and their jobs are no longer open."

No offers of reinstatement have been made even though many other employees have been hired. Sink testified that Wyatt and Reece were replaced by new hires in October 1994. (Tr. 9:1426–1428; 10:1524; R. Exh. 42.) The General Counsel contends that, even if Wyatt and Reece were replaced, Salem was required to offer them reinstatement when vacancies arose. (Br. 92.)

In December, before Maurice's letter of December 21 to Salem, Wyatt (Tr. 6:967–968, 984) and Reece visited the Union at Winston-Salem. Wyatt admits that he had heard that Salem had hired employees while he had been on strike and knew that Salem was hiring even that December. Wyatt learned this "about" the time of the unconditional offer (Tr. 6:984–985), but "after" the offer (Tr. 6:992). Reece testified similarly, extending the understanding into January 1985 that Salem was hiring. (Tr. 6:1012–1014, 1028–1029.) As Salem's summaries reflect, hirings made in 1994, based on applications made after October 4, include 16 apprentices and 3 (general) journeymen, although all were hired before the Union's letter of December 21. (R. Exh. 28 at 3.) Although Reece did not specify a date in January, several hires were made in January 1995, and included two apprentices hired on January 3, and a third hired on January 24, 1995. (R. Exh. 30 at 1.) Presumably Maurice, who was in charge of the campaign to find jobs for the Union's members, and to salt employers, including Salem, also had the same information during December 1994 and January 1995, that Salem was, and had been, hiring.

[16] Including the payroll records (R. Exh. 40 at 2; R. Exh. 41 at 7) as explained by Sink (Tr. 9:1417, 1422).

By letter (GC Exh. 29) dated October 27, 1995, Maurice asserted to NLRB Region 11, respecting the charge in Case 11–CA–16696,[17] that the Union's first knowledge of any hiring by Salem was not until about May 10, 1995, "when they hired Sean Gallagher, and then again on May 17, 1995, when they hired Stephen Necessary. Though the company might have, in fact, hired prior to these dates, we do not have any knowledge that they did." The letter was not offered or received for the truth of these assertions. (Tr. 1:168–169.) Although Maurice began to give testimony on the matter (Tr. 1:167), the General Counsel switched to the letter, and stated that Gallagher would be called. (Tr. 1:168.) Gallagher did not testify. In the view I take of the case, Gallagher's failure to testify is immaterial to the outcome.

3. Discussion

As noted earlier, Salem pleads and argues that the September 18, 1995 charge respecting the failure to reinstate Wyatt and Reece is time-barred by 29 U.S.C. 160(b). I agree.

As Judge Steven Davis, with Board approval, wrote in *Electrical Workers IBEW Local 25 (SMG)*, 321 NLRB 498, 500 (1996) (citations omitted):

> A charge must be filed and served within 6 months of the commission of the unfair labor practice, pursuant to Section 10(b) of the Act. The 6-month statute of limitations does not begin to run until there is either actual or constructive notice of the alleged unfair labor practice. In other words, until the aggrieved party knows or should know that his statutory rights have been violated.

A person may not sleep on his statutory rights. Thus, he has a duty to verify rumors which would cause a reasonable person to investigate. If there were no duty to verify those rumors which a reasonable person would investigate, then the statutory limitations period, as Judge Davis perceptively wrote in *IBEW Local 25 (SMG)*, supra at 500, could be tolled indefinitely simply by the individual's not seeking verification. Although the evidence of the rumors was more specific in *SMG* than here, both Wyatt and Reece (and, as I have found, Maurice also), during December 1994, and extending into January 1995 for Reece (and Maurice), had heard, and apparently believed, that Salem was hiring. As we know from the evidence, such rumors were true (although all the December hires came before the Union's letter of December 21). By no later than early January 1995, Wyatt and Reece, or Maurice on their behalf, were put on notice that they should exercise due diligence by writing Salem for verification of such rumors. If Salem verified the rumors, then Wyatt, Reece, and Maurice would have known that the limitations period was triggered. If Salem failed to answer, that failure could also be viewed as verification. If Salem lied, then such fraudulent concealment would toll the running of the limitations period.

Finding that Wyatt, Reece, and Maurice were put on reasonable notice by early January 1995 that, potentially, Salem was unlawfully declining to offer Wyatt and Reece reinstatement, I further find that they failed to exercise due diligence by waiting for verification to be delivered by Federal Express or UPS. Even then, in May 1995 it would not have been too late had they filed their charge promptly. Instead, Maurice delayed another 4 months, until September 1995, before filing the charge. I find, however, that as of early January 1995 the 6-month limitations period began to run. As the period expired well before the charge was filed which supports the allegation pertaining to the reinstatement of Jeffrey A. Wyatt and John Reece Jr., I shall dismiss complaint paragraph 21. *Electrical Workers IBEW Local 25 (SMG)*, supra.

G. The Joint Employer Issue

1. Introduction

On June 24, 1994, one of the last remaining unfair labor practice allegations (complaint paragraph 16) asserts, "Respondents" [the joint employer, Salem and Options] "failed to hire" Mack Good, Patrick Dean Parsons, and Paul D. Vogler. As the record reflects, this allegation pertains to the claimed withdrawal by Options of offers of employment, in June 1994, to Good, Parsons, and Vogler. Early in the trial Salem objected to any statements by Options' representatives as being hearsay as to it. Recall that Salem has denied the joint employer allegation set forth in complaint paragraph 10. Granting Salem a continuing (Tr. 1:102–103) objection (usually referred to as Salem's "standing" objection, Tr. 5:660, 786; 6:951, 999; 7:1088–1089), I ruled that the evidence would be received, as to Salem, subject to a ruling on the joint employer allegation (Tr. 1:102; 3:456; 5:660).

The time has come to address the joint employer allegation, for if Salem and Options were not a joint employer at the relevant time, then Salem is not bound by any conduct of Options, because (as the Government concedes (Tr. 9:1219) there is no independent allegation as to Salem covering Good, Parsons, and Vogler. Nor is Options alleged to be and independent agent of Salem. [And if Salem and Options were found, prima facie, to be joint employers, it would mean that the record would have to be reopened to receive Salem's evidence on the issue, for my ruling eliminated the need, and opportunity, for Salem to offer any such evidence.]

2. Facts

Early in this decision I described Salem's business operations. As I summarized there, Salem's policy is to hire employees on a long-term basis. As its needs require, Salem transfers employees between projects, borrows employees for short term from other contractors, and work employees overtime. (Tr. 9:1229.) On occasion, Salem contracts with temporary agencies to obtain employees on a temporary basis. During June 1994, Salem contracted with Options for temporary employees because Salem had three big short-term projects: Salem College, Wake Forest University, and Crest Tobacco.

During the relevant time, Options was a temporary employment service contractor. (Tr. 7:1103.) Gail F. Withers, who did not testify in this case, was Options' president. Jesse Banks Wilson Jr. was Withers' assistant in charge of "everything." (Tr. 7:1084, Wilson.) Wilson's responsibilities included taking applications, taking employees to the jobs, checking on the performance of the employees, and processing the payroll. (Tr. 7:1084–1086.) Every workday, Wilson testified, he would visit the jobsites and talk with the "supervisors" to determine how the temporary employees were performing. (Tr. 7:1105–1106, 1118.)

Sink located Options by checking the telephone directory's yellow pages. After speaking with Withers, and then meeting with her, Sink, on May 30, 1994, in his office, signed a one-

[17] Filed (by the Union) and served September 18, 1995, the charge in Case 11–CA–16696 is the first allegation that Salem had unlawfully refused to reinstate strikers Wyatt and Reece since "on or about 5/10/95." (GC Exh. 1w.)

page contract (GC Exh. 112) which Withers had provided as a proposal. (Tr. 7:1047, 1050–1051, 1080.) The May 30 contract specified the rates to be paid for the various classes of electricians, plus general laborer. Salem would pay Options the rate shown going to Options. Thus, for a journeyman the rate in the first of two columns is shown as $11.45 (apparently what Options would pay the employee, Tr. 7:1054), but in the Options' column it is shown as $16.60, and the latter is what Salem would pay Options (Tr. 7:1054).

Under the contract (which does not prescribe operating procedures), Salem would request employees from Options. (Tr. 7:1104, Wilson.) Independently, Options would select the employees to be sent from its own pool of employees who had applied to and been hired by Options (and had filled out the required papers, such as W-4 forms and work rules). Wages and benefits due the employees were paid directly from Options to the temporary employees—even before Salem had paid Options. (Tr. 7:1059, Sink; Tr. 7:1104–1105, Wilson.) Although Options paid the temporary employees their wages, Salem kept the time records and reported those figures to Options. (GC Exh. 113; 7:1058.) Salem did not furnish any work clothes such as steel-toed boots or hardhats, and provided no safety training for the temporaries from Options. (Tr. 7:1059.)

Salem's job foremen would direct the temporaries as to the work to be done, the hours of work, and when to take breaks. The job itself would dictate the hours to be worked. (Tr. 7:1060–1061, Sink.) As "part of the convenience of working with temporaries," Sink testified (Tr. 7:1060, 1064, 1066), if Salem did not like an employee's performance, Salem just sent him back to Options. Between May 20 [the referrals apparently started before the contract was finalized] and June 26, the period when Salem used temporaries from Options, Options supplied a total of 12 temporaries (most were laborers, and no more than 9 worked at any one time) to Salem for the Salem College job, plus one more for the job at Wake Forest University. (Tr. 7:1061, 1063–1064; 9:1387; GC Exh. 114 at 2.) Although Salem did send two or three of the temporaries back to Options, that could have been preceded by Salem's job foreman advising the temporary of some problem to see if the matter could be resolved. That was rare, however, and normally when a temporary proved unsatisfactory, Salem simply would tell Options to send someone to replace the undesired temporary. (Tr. 7:1065–1066.)

As noted earlier, when Wilson discussed work performance with Salem's job supervisors, if discipline was an indicated by such habits as tardiness or absenteeism, Wilson would transfer the employee to another job (apparently with a different employer) if one was available. (Tr. 7:1118.) On his visits to the jobsite, Wilson would be there anywhere from 5 to 30 minutes. (Tr. 7:1118.)

During the relevant time, Options was supplying workers (10 to 30 at any one time) to several customers, and Salem represented about 5 percent of Options' business. (Tr. 7:1118–1122.)

3. Discussion

The contractual arrangement and working conditions reflected in the evidence here are those of the American temporary-employee industry. First, an arms'-length contractual arrangement existed here between unrelated entities. Second, Options (the temporary service) was the employer in name, including the fact that it paid the employee by payroll checks issued by Options and provided the employees whatever fringe benefits were provided. Third, Options was the employer in fact. That is, while Salem, the operating company, assigned the work to be done and directed the temporary employees in that work (characteristics of any operating company using temporary employees), any discipline of the temporary employees was handled by Options. If Salem was dissatisfied with the performance of a temporary worker, Salem simply notified Options to recall the worker and to send Salem a different temporary employee. If Options decided to assign the replaced employee to a different employer, or to discipline the employee in some fashion, that was strictly up to Options.

Although Sink at one point testified that Salem would "rarely" discipline a temporary employee, his explanation shows that he merely was describing the situation in which a foreman (or general foreman or job superintendent) would give a temporary employee a type of courtesy notice that the employee was not performing in the way expected by Salem. That is nothing more than, as a courtesy, again explaining to a temporary worker what Salem wants done. Even that notice is rarely given, and when Salem is dissatisfied, Salem simply calls for a replacement. That is not discipline by Salem, but the exercise of a contractual right—standard, as Sink suggested, to the temporary worker industry. It is part of the "convenience" of using an independent contractor to provide the necessary workers.

Finally, Options daily monitored the work performance of the temporary workers by the president's assistant (Jesse Banks Wilson Jr.) personally checking with Salem supervisors. Such personal monitoring reinforced Options' role as the employer in fact.

As the facts disclose, Salem was merely the operating entity, while Options was the employing entity of the temporary workers it contractually provided to Salem. In short, Salem and Options were not joint employers of the temporary workers whom Options, by contract, provided to Salem. Finding no basis to reverse my dismissal, at trial, of complaint paragraphs 10 (joint employers) and 16 (June 24, 1994, failure to hire Mack Good, Patrick Dean Parsons, and Paul D. Vogler), I now reaffirm those (Tr. 7:1162; 9:1220) rulings.

H. Alleged Interrogation by Salem Electric

1. Introduction

As amended, complaint paragraph 14(a) alleges that, on December 8 or 9, 1994, Salem, by General Superintendent James Manuel, coercively interrogated its employees concerning their union affiliations and sympathies. Salem denies. Carlton Vaughn testified in support of the allegation.

2. Facts

Carlton Vaughn was the Government's last case-in-chief witness. On December 9, 1994, Vaughn testified (the date was in the question, Tr. 7:1132), Vaughn went alone to Salem's office (Tr. 7:1132, 1140) where he applied, according to his December 7, 1994 application (GC Exh. 120; R. Exh. 26), for a position as an electrician's helper. [As Salem's summaries (R. Exh. 28 at 3; R. Exh. 32 at 8) also show the application date to be December 7, I find that to be the correct date.] At the time, Vaughn was working for Regency Electric at $8 per hour (Tr. 7:1133, 1136, 1138–1139), as shown on his application. Also at that time Vaughn, while not yet a member of the Union, was engaged in the application process to become a member of the Union. (Tr. 7:1131–1132, 1137–1138.) Vaughn omitted from his application any reference to the Union, and omitted listing a

union employer he previously had worked for in 1984–1985. (Tr. 7:1135.)

After waiting a few minutes, following his submission of his completed application to the receptionist, Vaughn was called into General Superintendent Manuel's office for an interview. As Manuel went over the application, Vaughn testified, Manuel asked if Regency "was a union outfit." "And I said no, that I didn't have anything to do with union activities." (Tr. 7:1132–1133.) Vaughn testified (Tr. 7:1133) that Manuel then hired him as a "fourth year" (apprentice) at $8.60 per hour to begin the next day. [Actually, while Vaughn was hired as an apprentice at $8.60, as Salem's summaries show, his hire, or start, date was December 13, 1994, a Tuesday. R. Exh. 28 at 3; R. Exh. 32 at 8.] After working 2 weeks for Salem, Vaughn left for substantially higher pay at another contractor. (Tr. 7:1133–1134, 1144.)

Although Manuel does not recall the Vaughn interview (Tr. 10:1576), he denies asking, in any interview with a job applicant, whether the applicant's current employer was unionized. Manuel asserts that he does not ask such a question because, based on instructions from President Myers, Vice President Sink, and Salem's attorney, there are legal reasons he does not ask certain questions. (Tr. 10:1577.)

3. Discussion

Crediting Vaughn's specific memory and detailed description over Manuel's unpersuasive general denial, I find that, on December 7, 1994, General Superintendent Manuel—before hiring job applicant Carlton Vaughn—asked Vaughn whether Vaughn's current employer was "a union outfit." Citing no cases, the General Counsel contends that Vaughn's question was unlawful. Even if Vaughn is credited, Salem argues, there is no violation (citing an inapposite case dealing with crossing a picket line in the event of a strike and the reason for the question was explained).

Here, Manuel gave no explanation for his question. Presumably Manuel knew of Regency Electric and would know whether it was unionized. Thus, idle curiosity or a need for information does not appear to be the reason. The reason appears to have been a rather direct effort to elicit some comment from job applicant Vaughn that would reveal his union sympathies. I so find. In the context of a job interview, questions designed to elicit an applicant's position respecting unions are deemed inherently coercive. See *Aloha Temporary Service*, 318 NLRB 972, 974–975 (1995). That Vaughn felt it advisable to say (falsely) that he had nothing to do with union activities merely underscores the inherently coercive nature of such a question in the context of a job interview. Accordingly, I find that, as alleged, Salem violated Section 8(a)(1) of the Act by coercively interrogating Carlton Vaughn on December 7, 1994.

Salem also argues (Br. 57) that, even if a violation is found, no remedial order should issue for this isolated incident. A single instance of unlawful interrogation can be viewed as isolated, de minimis, and not rising to the level of requiring an exercise of the Board's remedial authority. See *Century Wine & Spirits,* 317 NLRB 1139 (1995).

Having dismissed all other allegations against Salem, I find that the single, unlawful interrogation does not warrant a remedial order. There being no violations by Salem which warrant a remedial order, I, therefore, shall dismiss the complaint in its entirety as to Salem Electric. *Century Wine & Spririts*, supra.

I. The Alleged Conduct of Options

1. Introduction

Two allegations are to be considered. First, complaint paragraph 13 alleges that, since about January 1994, "Respondents, through the actions of its agents and supervisors, at Respondent Options' Winston-Salem, North Carolina facility, has interfered with, restrained, and coerced its employees" when Options' president, Gail Withers, interrogated employees concerning their union affiliation and sympathies on May 31 and June 24, 1994, and when Withers' assistant, Jesse Banks Wilson Jr., did the same on June 9, 1994. In their answers, both Options and Salem deny the allegations.

Second, paragraph 16 alleges that, on June 24, 1994, "Respondents failed and refused to hire" Mack Good, Patrick Dean Parsons, and Paul David Vogler (because, paragraph 23 alleges, of their support of the Union).

As I have discussed, at trial, and reaffirmed in this decision, I dismissed complaint paragraphs 10 (joint employer allegation) and, as to Salem, paragraph 16 (June 24 refusal to hire Good, Parsons, and Vogler). Apparently through inadvertence, Salem never moved to dismiss, as to it, complaint paragraph 13 (the interrogation allegation). The complaint does not name Options as an agent of Salem, and the Government concedes (Tr. 9:1219) that there is no independent allegation as to Salem covering the June 24 refusal to hire Good, Parsons, and Vogler. Additionally, all through the trial the basis of my rulings overruling Salem's hearsay objections was that everything was tied to the joint employer allegation—if that were dismissed, Salem had no liability regarding the other. At no point did the General Counsel argue that the (joint) agency reference in complaint paragraph 13 would apply to Salem even if the joint employer allegation were dismissed. Under all the circumstances, I treat Salem's motions to dismiss complaint paragraphs 10 and 16 to include, impliedly, paragraph 13, and I now grant that implied motion to dismiss, as to Salem, complaint paragraph 13. That leaves paragraphs 13 and 16 as to Options, a matter I now turn to address.

2. Alleged interrogation

a. May 30, 1994—Gail Withers

Jeffrey A. Wyatt (Tr. 6:950–951) and John Reece Jr. (Tr. 6:998–1000) testified that, on May 30, 1994, they applied for work at the office of Options. Options' president, Gail Withers, asked if they were members of a union. Wyatt (Tr. 6:951, 969–970) and Reece (Tr. 6:999–1000) truthfully answered that they were not. Reece adds that he asked Withers whether Options was hiring for Salem, and Withers said yes, plus other (unnamed) contractors. (Tr. 6:999, 1019, 1021.) In his July 26, 1994 pretrial affidavit (given less than a month after the event), Reece makes no mention of any such question to Withers and answer by her. (Tr. 6:1021.) Reece testified that he was interviewed by the Board agent over the telephone while he, Reece, was in West Virginia. The drafted affidavit was mailed to him, and he read it over before signing it. (Tr. 6:1031–1032.)

Although I credit Wyatt and Reece concerning the question Withers asked regarding whether they were union members, I do not credit Reece regarding his claimed question to Withers about Salem. Wyatt did not describe such, Reece's affidavit contains no such reference, and Reece's demeanor was unimpressive on this part of his testimony.

While, as I have found, President Withers asked the two job applicants whether they were members of a union, that is dif-

ferent from asking about their union sentiments. Withers did not do the latter. There could have been a practical reason for Withers to have mentioned the topic, such as to tell Wyatt and Reece that the work would not be under a union contract. However, as there is no evidence Withers explained any practical basis for her question, as her question was made by Options' president, and during a job interview, I find that it reasonably would tend to be coercive. Accordingly, I find that, by President Withers' question on May 30, 1994, Respondent Options violated Section 8(a)(1) of the Act.

b. June 9, 1994—Jesse Banks Wilson Jr.

At the suggestion of Business Manager Maurice (Tr. 1:107; 3:477), on June 9, 1994, Mack Good (Tr. 5:658–660), Patrick Dean Parsons (Tr. 3:455, 477), and Paul D. Vogler (Tr. 5:784) went to the office of Options to apply for work as electricians. Options' Jesse Banks Wilson Jr. acknowledges that they applied (Tr. 7:1086, 1098), and their Options' applications (GC Exh. 83; R. Exh. 19, and GC Exh. 96) are dated June 9, 1994.

As Parsons describes (Tr. 3:455–457), as Wilson gave applications to the three, he asked whether they were associated with a union. They answered yes, and Good asked if that was a problem. "No," Wilson replied, there was no problem, but he wanted to make sure that they understood that Options and its contractor customers were not affiliated with a union and, therefore, Options would not be paying them union scale. The proceeded to complete their applications, sign W-4 forms, and authorizations to take drug screens. Wilson gave them a booklet covering Options' policies and safety rules. Vogler recalls that Wilson said the job was not union (Tr. 5:788), while Good's description (Tr. 5:661–662) omits any reference to such a question by Wilson.

During his testimony, Wilson was not asked whether he asked such a question. (Recall that Options' attorney did not participate in the trial.) I credit the detailed description give by Parsons. Given in response to Good's question, Wilson's explanation of his question about their union status neutralizes any coercive sting the question would otherwise have. Accordingly, I shall dismiss complaint paragraph 13(a) respecting the Jesse B. Wilson allegation for June 9, 1994.

c. June 24, 1994—Gail Withers

Pursuant to a call from Wilson the day before, on June 23 Good, Parsons, and Vogler reported to Options' office. I discuss this visit under the allegation that Options refused to hire them. At this point, I note that, on June 24, they alerted Business Manager Maurice that their hires (according to their version) had been canceled. As a result, Maurice dispatched Patrick A. Maloney (who had only that day joined the Union) to Options with instructions to conceal his union membership. (Tr. 1:131; 2:235, Maurice; Tr. 2:333–334, Tr. 338–339, Maloney.)

At Maurice's request, Allan T. Samuels, accompanied by Michael K. Joyner, drove Maloney to the Options office that June 24. (Tr. 2:334, Maloney; Tr. 2:353, Joyner; Tr. 6:903, Samuels.) Maurice also wanted Samuels to be a witness concerning whether Maloney was hired. (Tr. 6:919–921.) In the office, only Maloney took an application. After Maloney completed his application, Gail Withers, Options' president, inspected it and asked whether he had ever been associated with or involved in a union. Maloney said no. Withers said she had a client who was looking for electricians, and inquired whether he would be available for work. Maloney said yes, that he was available immediately. Withers gave Maloney a W-4 form, insurance papers, and a drug-authorization form to sign. Later that day he took the drug test, and was told to report for work, Monday, June 27, at Salem's Wake Forest University jobsite in Winston-Salem. Maloney's application (R. Exh. 18) contains no reference to affiliation with any union, and he gave no indication that he supported unions. (Tr. 2:334–336, 345, 348, Maloney.) Samuels confirms that Withers asked Maloney whether he was affiliated with the Union. In fact, Withers asked whether any of the group was. Maloney said no. (Tr. 6:904.) Joyner simply has Withers asking the group. (Tr. 2:354.) Withers did not testify. I credit the version given by the employees, particularly that by Maloney.

As Withers' question came from the employer's president, in the setting of the job application process, it reasonably would tend to be coercive. That is, a job applicant would likely perceive that he would have to conceal any union affiliation if he hoped to get a job. I so find. By such question, I further find, Options violated Section 8(a)(1) of the Act, as alleged.

3. Alleged discrimination

Pursuant to Wilson's call to Vogler the previous day, on June 23, Good (Tr. 5:662) and Vogler (Tr. 5:788–789) appeared at Options' office ready to be sent for a drug screen. [Parsons was not there because, as he told Wilson the previous day, he was going out of town for several days and would not be available for the assignment. Parsons concedes that he was never hired by Options. (Tr. 3:458–460, 471.)] According to Good, in answer to his question, Wilson said that, if they passed the drug test, they would be assigned to Salem at Wake Forest University. (Tr. 5:662, 673.) Vogler describes no such disclosure by Wilson on June 24, but he does claim (Tr. 5:788) that, during the June 9 application visit, Wilson disclosed that the job was at Wake Forest University and that the contractor was Salem Electric. Vogler did not report this fact in his pretrial affidavit. (Tr. 5:806.) Wilson denies ever disclosing Salem's name. (Tr. 7:1107.) On this point, Wilson testified persuasively, and I credit his denial.

Before Good and Vogler left for their drug screen, Good informed Wilson that, when they got to the job, they would "organize them when we get out there." (Tr. 5:662.) Vogler recalls that, when they again discussed money, Good and Vogler told Wilson "that we would probably organize during lunches and breaks." When Wilson asked what that meant, they explained that they were trying to organize labor into the IBEW. Wilson said nothing further. (Tr. 5:789–790.)

The following day, June 24, Options canceled the job assignment for Good and Vogler. Good testified Withers called him and reported that the customer had called and said they no longer needed any electricians. She then hung up. (Tr. 5:663–664.) Wilson confirms that, but for the remark about intending to organize the company they were being sent to work for, they would have been hired, assuming they passed the drug screen. (Tr. 7:1087–1088, 1090, 1100, 1127.)

Wilson reported this remark to Withers. (Tr. 7:1088, 1090.) Withers replied that (Salem's vice president) Sink had told her that he wanted good electricians, but none who were union. After the unfair labor practice charge was filed, Withers directed Wilson to write a short file note on the matter. (Tr. 7:1090–1091, 1094–1095.) Wilson's brief file note (GC Exh. 115) reports the remark and states that it "was taken as an attitude problem which can't be tolerated on any of our jobsites. So the job order was terminated."

Wilson testified that his interpretation of Good's remark is that the two intended to devote their time to organizing rather than working. (Tr. 7:100–1101, 1127.) Wilson would have had no problem with organizing that was incidental to doing the job, but (Tr. 7:1127–1128) "that ain't the way that the statement was made to me."

I do not credit Wilson. Although at trial his story, if credited, would show that he had no unlawful motivation (in essence, he would not want to send anyone who would spend work time walking around trying to organize), I find that his understanding of the consequences as of the trial was deeper than that which he had in June 1994. It is significant, I find, that his brief memo (GC Exh. 115) addresses only an "attitude problem." Moreover, Vogler explained that their organizing would be limited to lunch and break periods.

In any event, it is not Wilson's motivation which counts, but that of Withers, the decision maker. Although Wilson "guesses" (Tr. 7:1127) that Withers viewed the situation as did he, I find that her motivation was tied to her report to Wilson of a statement attributed to Salem's Sink—don't send any union electricians. [I consider this attributed statement only in regard to Withers' motivation. It is not substantive evidence as to Salem because Salem and Options are not a joint employer and there is no independent allegation that Options or Withers was an agent of Salem.] The motivation of Withers, I find, was to please Salem, and that meant, in her understanding, that she was not to send anyone who was an active supporter of a union.

In short, I find that the evidence proves that, as alleged by complaint paragraphs 16 and 22, that, on June 24, 1994, Options violated Section 8(a)(3) of the Act by refusing to hire Mack Good and Paul D. Vogler because of union considerations. The evidence fails to show that Options would not have hired them in any event. I shall dismiss complaint paragraph 16 as to Patrick Dean Parsons because he advised Wilson that he would not be available for several days. Thus, Parsons removed himself from consideration.

CONCLUSIONS OF LAW

1. With one exception, the evidence is insufficient to show that Salem Electric Company violated Section 8(a)(1) and (3) of the Act, as alleged. The single exception is an unlawful interrogation by General Superintendent James Manuel on December 7, 1994.

2. Because the single unlawful interrogation by Salem is isolated and de minimis, it is appropriate that no remedial order be issued and that the complaint be dismissed in its entirety as to Salem Electric.

3. Respondent Options Temporary Employment Service has violated Section 8(a)(1) of the Act by unlawful interrogations by President Gail Withers on May 30, 1994, and again on June 24, 1994, but did not unlawfully interrogate, as alleged, by Jesse Banks Wilson Jr. on June 9, 1994.

4. Options violated Section 8(a)(3) and (1) of the Act on June 24, 1994, by refusing to hire Mack Good and Paul D. Vogler, but not by failing to hire Patrick Dean Parsons who had removed himself from consideration for employment at that time.

REMEDY

Having found that Respondent Options has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. However, no remedial order is required concerning the de minimis interrogation violation by Respondent Salem, and the complaint is being dismissed in its entirety as to Salem.

Although the record suggests that Options may no longer be in business, that matter is not definitely established in the record. I, therefore, will issue a remedial order as to Options. The remedial formula is set forth in *WestPac Electric*, 321 NLRB 1322, 1322–1323 (1996). Because Respondent Options discriminatorily failed and refused to hire job applicants Mack Good and Paul D. Vogler, I shall order it to offer them employment to the same or substantially equivalent positions for which they applied, without prejudice to any seniority or any other rights or privileges to which they would have been entitled in the absence of the Respondent's hiring discrimination. Additionally, I shall order the Respondent Options to make both of them whole for any loss of earnings or other benefits which they may have suffered as a result of the discrimination practiced against them, from the date they applied for employment to the date that Respondent Options makes them a valid offer of employment. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The complaint is dismissed in its entirety as to Respondent Salem Electric Company, Inc.

Respondent Options Temporary Employment Service, Inc., Winston-Salem, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire job applicants or otherwise discriminating against any employee for supporting International Brotherhood of Electrical Workers, AFL–CIO, Local Union 342, or any other union.

(b) Coercively interrogating any employee or job applicant about union support or union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mack Good and Paul D. Vogler, employment in jobs for which they applied or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

(b) Make Mack Good and Paul D. Vogler whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire either

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Mack Good or Paul D. Vogler, and within 3 days thereafter notify the job applicant employees in writing that this has been done and that the discrimination will not be used against either of them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Winston-Salem, North Carolina facility copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by Respondent Options' authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent Options has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 10, 1994, the date the second amended charge herein was filed and served in Case 11–CA–16141.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found, including, as to Respondent Options, complaint paragraph 13(a) as to Jesse Banks Wilson Jr. for June 9, 1994, and paragraph 16 as to alleged discriminatee Patrick Dean Parsons for June 24, 1994.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights, and more specifically:

WE WILL NOT discriminate against you or job applicants because of your (or their) membership in a local of the International Brotherhood of Electrical Workers, or because of your (or their) activities on behalf of the IBEW or one of its locals or any other union.

WE WILL NOT coercively interrogate you or job applicants about union membership, support, or activities.

WE WILL, within 14 days from the date of the Board's Order, offer to job applicants Mack Good and Paul D. Vogler employment in jobs for which they applied or, if such jobs not longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had been hired.

WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our refusal to hire Mack Good and Paul D. Vogler, and we will within 3 days thereafter notify each of them in writing that this has been done and that the discrimination will not be used against them in any way.

SALEM ELECTRIC COMPANY, INC. &
OPTIONS TEMPORARY EMPLOYMENT
SERVICE, INC.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."